Petition

81-986

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In the Supreme Court of the United States

OCTOBER TERM, 1981

McLEMORE'S WHOLESALE & RETAIL STORES, INC.,

Petitioner

vs.

CHARLES PAYNE,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

Whether an employee who engaged in consumer picketing activity against his employer, a retail concern, urging a total consumer boycott of his employer's business, without first affording his employer and/or appropriate government agencies an opportunity to resolve underlying grievances, thereby engaged in lawful "opposition" activity under § 704(a) of Title VII where no evidence was offered as to (1) any unfair employment practices engaged in by his employer; (2) his employer's awareness of his "opposition" purpose in picketing; or (3) the basis, or reasonableness, of his belief that his employer had engaged in unfair employment practices?

Whether an employee who engaged in consumer picketing activity against his employer, a retail concern, has the burden of proving, both as part of his *prima facie* case and as part of his ultimate burden of proof, that the form of his opposition activity is protected under § 704(a) of Title VII?

Whether the Court of Appeals erred in supplying the critical factual finding (that plaintiff engaged in lawful opposition activity protected by § 704(a) of Title VII based upon a reasonable belief that his employer's hiring and promotional policies violated Title VII) admittedly not made by the district court?

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IN THE
SUPREME COURT OF THE UNITED STATES
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NO.

McLEMORE'S WHOLESALE &
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Petitioner

vs.

CHARLES PAYNE,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, McLemore's Wholesale and Retail Stores, Inc. (hereinafter called Petitioner), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on September 4, 1981.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals in this case is reported at 26 FEP 1500 (5 Cir. 1981) and is set forth at Appendix "A" hereto.

The order of the Fifth Circuit Court of Appeals denying rehearing and rehearing *en banc* is unreported and is set forth at Appendix "B" hereto.

The judgment of the United States District Court for the Western District of Louisiana upholding plaintiff's claims is unreported and is set forth at Appendix "C" hereto. The district court's reasons for judgment are unreported and are set forth at Appendix "D" hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on September 4, 1981 (App. A). On October 20, 1981 the Court of Appeals stayed its mandate to and including November 23, 1981 (App. E). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 704(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e–3(a) reads in pertinent part as follows:

> § 704(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment * * * *because he has opposed any practice, made an unlawful employment practice, by this title,* or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title. (emphasis supplied)

STATEMENT OF THE CASE

A. Statement Of Facts

Petitioner's business activities are summarized in decision of the Court of Appeals. However, it should be noted that respondent's approximately twenty (20) co-workers at the fertilizer plant consisted of five (5) white employees and fifteen (15) black employees.

Similarly the facts of plaintiff's employment and activities are summarized in the opinion of the Court of Appeals, but require additional development. Respondent became involved in the formation and organization of an entity known as the Franklin Parish Improvement Association (FPIA), a non-profit organization of black persons based in Winnsboro, Louisiana which sought to better their social conditions. His co-employee Mr. Brass was also active in the organization's formation. No other of petitioner's employees was involved.

There is no record evidence that the FPIA was formed in opposition to any employment practices committed by petitioner. *A fortiori* there is no evidence petitioner was aware the boycott and picketing was motivated by any opposition to unlawful employment practices. Indeed, there is no record evidence of any unfair employment practices of petitioner prior to FPIA's formation or its boycott of petitioner's store, discussed *infra*. Petitioner had no discrimination charges filed against it prior to FPIA's formation and its contemporaneous boycott. In fact, save the one charge which forms the basis for this lawsuit, petitioner has not had another discrimination charge filed against it.

As stated, respondent and Mr. Brass organized the boycott and picketing of *their* employer's business. They also participated in the picketing of petitioner's stores, a fact which became known to petitioner's manager Mr. Hill and to Mr. McLemore. Mr. Hill observed respondent escorting people around McLemore's parking lot. Respondent was arrested in front of petitioner's property for blocking the entrance to petitioner's store after refusing to get off petitioner's property. Mr. Brass was also arrested during the picketing. There is no record evidence that respondent, Mr. Brass or anyone connected with FPIA made any effort to discuss any employment related grievances with petitioner prior to the boycott. Respondent made no effort to prove any unfair employment practices of petitioner prior to the boycott.

B. Course Of Proceeding And Disposition Of The Case

This action commenced on June 17, 1976 in the United States District Court for the Western District of Louisiana, Monroe Division. The Complaint alleged the necessary compliance with Title VIII procedural prerequisites. Nowhere in the Complaint is it alleged that petitioner's refusal to rehire respondent violated § 704(a) of Title VII or that it was due to his lawful opposition activity under § 704(a). Petitioner's answer denied all substantive allegations of the Complaint and alleged no affirmative defenses.

A "Second Amended Pre-Trial Stipulation" was filed which was signed by the parties and the Judge and governed the proceeding. Nowhere in the Stipulation is § 704(a) mentioned and nowhere in this Stipulation is it contended that respondent's conduct was protected op-

position activity under § 704(a). (App. F).

Following the trial, the Court orally stated its Findings of Fact and Conclusions of Law. (App. D). The Court found that petitioner refused to rehire respondent because of his civil rights activities and that his activities were protected activity under § 704(a) of Title VII. The Court did *not* find or conclude that Respondent was not rehired because of his *race* and did not find that respondent was threatened with bodily injury, the only alleged violations in the Complaint. The Court made no finding as to 42 U.S.C. § 1981.[1] The Court awarded backpay, to be computed by the parties, but declined to order reinstatement because respondent was presently employed at a much higher salary than petitioner would pay a man in respondent's position.

The panel majority affirmed the district court decision. (App. A) Thus, the panel majority affirmed the district court judgment. Judge Coleman dissented. (App. pp. A-36-38) Petitioner's applications for rehearing and rehearing en banc were summarily denied on October 16, 1981. (App. B)

REASONS FOR GRANT OF THE WRIT

The decision of the panel majority in this case raises compelling issues of national importance which require the grant of the writ requested.

First, the decision of the Court of Appeals conflicts

1. No appeal was taken from this failure. The § 1981 claim was clearly time barred and the Court lacked subject matter jurisdiction over it. See *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 44 L.Ed.2d 295 (1975); *Williams v. CLE Corporation*, 556 F.2d 346 (5 Cir. 1977); *Richardson v. Delta Drayage Co.*, 21 FEP 69 (E.D. La. 1977).

with the decisions of other Courts of Appeals as to the protection afforded by § 704(a) of Title VII.

Second, the decision of the Court of Appeals improperly and in conflict with applicable decisions of this Court allocated to petitioner the burden of proving that the form of respondent's § 704(a) opposition activity was unprotected rather than requiring respondent to prove such activity protected.

Third, the issues raised by this case as to the scope of § 704(a) are recurring and increasingly litigated ones involving important issues of statutory interpretation which have not yet been addressed by this Court.

Fourth, the Court of Appeals in this case, in going outside the record evidence in the case and supplying a critical factual finding admittedly not made by the district court, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

ARGUMENT

A. The Decision Of The Panel Majority Conflicts With The Decisions Of Other Courts Of Appeals As To The Protection Afforded By § 704(a), An Increasingly Litigated, Recurring Issue Of Statutory Interpretation Which Has Not Yet Been Addressed By This Court.

As is readily discernible there are two distinct clauses to § 704(a), quoted supra, which identify two discrete unlawful employment practices. First, it is an unlawful employment practice to discriminate against an employee because the employee "has opposed any prac-

tice, made an unlawful employment practice by this title . . . " (hereinafter referred to as the "opposition" clause). Second, it is an unlawful employment practice to discriminate against an employee because the employee " . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this title." (hereinafter called the "participation" clause). See B. L. Schlei & P. Grossman, *Employment Discrimination Law,* Ch. 15.[2] The legislative history of Title VII provides no guidance as to the scope of protection afforded by § 704(a). See *Green v. McDonnell Douglas Corp.,* 463 F.2d 337, 341 (8 Cir. 1972) mod. 463 F.2d 352 (8 Cir. 1972), remanded 411 U.S. 792, 36 L.Ed.2d 668 (1973); *Hochstadt v. Worcester Foundation,* 425 F.Supp. 318 (D.C. Mass. 1976) aff'd. 545 F.2d 222, 230-232 (1 Cir. 1976).

The District Court found and concluded that petitioner had violated § 704(a) as follows:

> In refusing to rehire Mr. Payne, because of his civil rights activities, the defendant was in violation of Section 704A, which in part provides that it shall be an unlawful employment practice for an employer to discriminate against any of his employees, or applicants for employment because he has proposed [sic] any practice made unlawful by this title, or because he made a charge, testified, assisted, participated, in a [sic] manner in an investigation under this title. The Supreme Court has approved that language and the affect [sic] of it in the principle [sic] case of McDonnell-Douglas [sic] versus Green. This Court, holds that the civil rights activities that

2. Including by the same authors the 1979 Supplement.

> was [sic] engaged in was a protected activity described in Section 704A of Title VII; and that as a matter of law, this Court finds that he was not rehired because of his involvement in the protected activity of picketing and boycott and the like. (App. D)

The District Court's decision is clearly predicated upon the "opposition" clause in that it concludes that respondent was not re-employed following his November 1970 layoff because of his "involvement in the protected activity of picketing and boycott and the like."[3]

The panel majority affirmed. It found that respondent had *failed* to prove that his picketing was in opposition to unlawful employment practices but held that such proof was unnecessary. (App. A, pp. A-20-21) Rather, the panel majority held that respondent only need prove that his opposition activity was based upon a *reasonable belief* that petitioner had committed unlawful employment practices. (Id.) The panel majority, while admitting that the district court made no such factual finding, (Id.) concluded that "such a finding is implicit and is sufficiently supported by evidence in the record". (Id.) Having thus adopted a new test and having manufactured the pivotal factual finding out of whole cloth, the Court then concluded that petitioner had the burden of raising the issue that respondent's picketing was unprotected by § 704(a) and ultimately proving that such picketing is unprotected.[4] (Id. pp. A-24-36)

3. At the time of the refusal to rehire in early 1971, respondent had not filed a charge or "participated" in any Title VII proceeding. In fact, he filed the charge *over* his failure to be rehired. See *Hearth v. Metropolitan Transit Commission*, 436 F.Supp. 685, 686 (D.C. Minn. 1977).

4. Judge Coleman dissented on three bases: First, he found the plain language of § 704(a) to require opposition to actual unlawful employment practices; second, he found the panel's action in supplying the critical fact of reasonable belief improper and doubly so where not one single specific fact was cited to support such a finding; and, third, he concluded that picketing with an object of harming one's own employer in his business is not protected opposition activity. (Id. pp. A-36-38)

A *prima facie* violation of either the "opposition" or "participation" clause is proven by a showing that employee engaged in protected participation or opposition activity, that the activity was in opposition to an unlawful employment practice, that the employer was aware of the opposition, and that thereafter the employer took some adverse personnel action against the employee based upon the opposition activity, i.e., a causal link between the protected expression and the adverse employment action. *Hochstadt v. Worcester Foundation,* supra; *Employment Discrimination Law,* supra. Petitioner contends that respondent did not prove a *prima facie* and/or ultimate violation of § 704(a) because he failed to prove that his civil rights activity ("picketing, boycott and the like") was in opposition to an unlawful employment practice under Title VII. See *Hochstadt v. Worcester Foundation,* supra, 545 F.2d at 230; *Monteiro v. Poole Silver Co.,* 615 F.2d 4 (1 Cir. 1980); *Silver v. KCA, Inc.,* 586 F.2d 138 (9 Cir. 1978); *Ammons v. Zia,* 448 F.2d 117 (9 Cir. 1971); *EEOC v. C&D Sports Wear Corp.,* 398 F.Supp. 300 (M.D. Ga. 1975); *Winsey v. Pace College,* 394 F.Supp. 1324 (S.D. N.Y. 1975); *Women Employed v. Rinella & Rinella,* 468 F.Supp. 1123 (N.D. Ill. 1979); *Wallace v. Motherhood Maternity Shops,* 17 FEP 242 (E.D. Cal. 1977). Title VII's unlawful employment practices are set forth in § 703(a)(1)(2) of the Act. 42 U.S.C. § 2000e−2(a)(1)(2). § 704(a) actually incorporates § 703(a) by reference. *Silver v. KCA, Inc.,* supra. The only unlawful employment practice litigated was the § 704(a) violation as to respondent and the panel majority admits that no unlawful employment practices were proven.

The only reference in the record to employment practices as having anything at all to do with the formation of FPIA and its subsequent picketing activities was a brief five lines in respondent's testimony and one line in

Mr. Brass' testimony out of approximately two hundred fifty (250) pages of trial testimony and exhibits. This scant testimony was to the effect that *one* of the many purposes of FPIA and its activities was to cause blacks to be hired *by stores*. Even if the *sole* purpose of the FPIA and plaintiff's civil rights activities was to obtain jobs for blacks in the community, the activity would not necessarily be in opposition to a practice of petitioner made unlawful by Title VII as § 704(a) requires. Take the case of petitioner's fertilizer plant where respondent worked along with fifteen (15) other black employees and only five (5) white employees. If respondent engaged in his civil rights activities to obtain the five (5) jobs filled by white incumbents for blacks, no one would contend that his activity was *per se* in opposition to *unlawful* employment practices. Certainly discrimination is not implied in the makeup of such a work force and petitioner has no duty to maximize its employment of minorities. See *Furnco Construction Co. v. Waters*, 438 U.S. 567, 57 L.Ed.2d 597 (1978).

There is not even one single *allegation* in this case that petitioner engaged in any unlawful employment practice under Title VII which respondent and the FPIA opposed by their boycott and picketing. The only alleged unlawful employment practice is alleged to be *as a result of the boycott* which had ended when the refusal to rehire was alleged to have taken place. Thus, there is no record evidence to support, nor logical syntax to, the Court's conclusion that respondent's civil rights activity was protected opposition activity. If respondent had believed that petitioner had engaged in unlawful employment practices, he would have made those allegations in his EEOC charge and this lawsuit. He did not because, as Mr. McLemore testified, there was no truth to any allegation that blacks had no jobs insofar as his company was concerned.

In truth, the record more persuasively establishes that respondent and FPIA engaged in their consumer boycott and picketing activity for many reasons other than employment related ones. The issues of integration of public facilities and common courtesy to blacks as customers predominate in the record. The FPIA sought to integrate public swimming pools and recreation facilities. It sought to achieve fair treatment for its people *as* consumers.

There is no evidence in the record that plaintiff, his witness and co-employee Mr. Brass, or any other person raised any complaint about alleged unfair employment practices prior to the boycott with any person in the McLemore organization. Respondent raised no complaints in his EEOC charge and accompanying affidavit other than the one personal to him arising out of his not being employed because of, and after, the boycott. Plaintiff made no general allegations in his complaint of unfair employment practices committed by petitioner.

Respondent's failure to allege and prove that his civil rights activities (picketing, boycott and the like) were in opposition to petitioner's unlawful employment practices under Title VII is fatal to his case. In *Silver v. KCA, Inc.*, supra, the plaintiff proved that she opposed a co-employee's racial slur of co-employee, arguably an unlawful employment practice. The racial slur was not one for which the employer was legally responsible. The Court held that an employer does not violate § 704(a) unless the opposition activity is to an employer's unfair employment practice under Title VII. Similarly, in *Women Employed v. Rinella & Rinella*, supra, plaintiff alleged only a § 704(a) violation in its complaint. There, the former employee who made a public statement accusing defendant of maintaining a sexually discriminatory insurance program and who belonged to the

plaintiff women's organization, contended that she need not prove the practice opposed was actually discriminatory. 468 F.Supp. 1123, 1126. In these circumstances the Court held there should have been a voluntary non-suit by plaintiff. Here, if respondent contended that petitioner discriminated in hiring and promotions in its operations he had standing to raise and litigate that issue and should have done so. Because of his failure to do so, he cannot now be heard to claim that he opposed an unlawful employment practice.

In *Monteiro v. Poole Silver Co.*, supra, the plaintiff filed an EEOC charge (i.e., protected *participation*) but in a subsequent altercation wrongfully accused his supervisor of discrimination, for which he was discharged. The Court held that he had not engaged in protected opposition activity because the accusation was not well founded, i.e., plaintiff had not opposed an actual unlawful employment practice. Thus, the First Circuit in *Hochstadt* and *Monteiro* and the Ninth Circuit in *Silver*[5] require proof of opposition to an *actual unlawful employment practice.* The requirement of opposition to an unlawful employment practice is in accord with the plain language of the statute.

The Seventh Circuit's holding in *Berg v. LaCrosse Cooler Co.*, 612 F.2d 1041 (7 Cir. 1980), that proof of a reasonable belief that the employer engaged in unlawful employment practices is enough to satisfy the statutory language, is easily explained by reference to the unusual factual situation in that case. The employment practice opposed[6] in that case, denial of pregnancy benefits, was

5. In an earlier panel decision in *Sias v. City Demonstration Agency*, 588 F.2d 692, 18 FEP 981 (9 Cir. 1978), the Ninth Circuit adopted the more lenient reasonable belief test. In *Sias* the employee was engaged in actual *participation* prior to her discharge and thus the opposition clause holding is pure *dictum.*

6. The Court emphasized the mild, polite nature of the opposition activity. 612 F.2d 1041, 1042.

at the time illegal under state law, illegal under Seventh Circuit law, and was subsequently illegal under a Congressional amendment to Title VII. Only for a short time, and that *after* plaintiff had engaged in her opposition, while *General Electric Co. v. Gilbert*, 429 U.S. 125, 50 L.Ed.2d 343 (1976), a 5-4 decision by the Court, was the law, was the employment practice opposed by the *Berg* plaintiff not an actual unlawful employment practice.

Thus, the panel majority's decision is contrary to decisions of other circuits which have decided the issue. Its decision is contrary to the plain language of the statute itself. As a matter of policy, its decision encourages employees to by-pass the administrative machinery created by Congress to deal with discrimination claims and to resort to coercive self help. Thus, the congressional aims of informal resolution and voluntary conciliation are thwarted. If respondent here reasonably believed petitioner had engaged in hiring or promotion discrimination as found by the panel majority, he should have filed an EEOC charge on those bases and if those charges were incorrect, or even false, he would have engaged in protected participation, *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998 (5 Cir. 1969), and those claims would have been resolved peaceably and perhaps voluntarily. Since plaintiff chose the more forceable, coercive route of self help and chose to by-pass the congressionally created remedy, he must be held to the congressionally created higher standard that he be correct in his claims of employer unlawful employment practices.

B. The Decision Of The Panel Majority Incorrectly Applied Supreme Court Precedent As To The Shifting Burdens In A Title VII Disparate Treatment Case.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 668 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 67 L.Ed.2d 207, 216 (1981), the Court set forth the basic allocation of burdens and order of presentation of proof in a Title VII disparate treatment case. This Court made clear in *Burdine* that the role of presumptions and shifting burdens in Title VII cases is to facilitate the trial of the case and to sharpen the factual inquiry. The *prima facie* case is not a rigid formula but merely a device by which the trier of fact may conclude that an inference of discrimination has been raised which, if unexplained, warrants a finding of discrimination. Aside from petitioner's contentions in Part A, above, a reading of the decision of the panel majority in this case clearly shows that plaintiff utterly failed in another respect to establish a *prima facie* case, namely, plaintiff failed to prove a causal link between protected expression and the adverse personnel action.

There is no proof in this case, and the panel majority cites none, that petitioner was *aware* that respondent by his picketing, etc., opposed allegedly unlawful employment practices. Prior to this picketing respondent had not confronted petitioner with any claims of discrimination. Since petitioner was unaware of respondent's "opposition" reasons for picketing, if any, no inference of a motive to discriminate for those reasons was created. The decision of the panel majority conflicts with that of other courts of appeal as to whether a *prima facie* case is proven without a showing of awareness by defendant of the plaintiff's opposition activity.

In *Ammons v. Zia*, 448 F.2d 117 (9 Cir. 1971), the Court held that an employer which took into account plaintiff's repetitive complaints about pay did not violate § 704(a) in discharging plaintiff where plaintiff's complaints of *sex based* pay discrimination were not a factor in its decision. Similarly, here petitioner un-

doubtedly refused respondent rehire because of his picketing and boycott activity, of which it was admittedly aware, but there was no showing that the refusal to rehire was causally related to picketing and boycott activity *directed at opposing unlawful employment practices.* In law, and in logic, an employer must be aware of an employee's opposition to unlawful employment practices in order to discriminate because of such opposition. *Hochstadt v. Worcester Foundation,* supra; *Wilson v. Willowbrook, Inc.,* 433 F.Supp. 321 (N.D. Tx. 1977). Here there is no proof that petitioner was aware at the time of the refusal to recall that respondent opposed an unlawful employment practice. The panel majority did not so find.

In *Gunther v. County of Washington,* 602 F.2d 882 (9 Cir. 1979), on rehg. 623 F.2d 1303 (9 Cir. 1980), aff'd. 68 L.Ed.2d 751 (1981), the employer was found not to have violated § 704(a) by refusing plaintiffs rehire where there was no proof that it was aware of plaintiffs' opposition to alleged unlawful pay practices. In finding that plaintiffs had not established a *prima facie* case of retaliation, the *Gunther* Court specifically relied upon the fact that the plaintiffs there had never confronted their employer with claims of discrimination.

> . . . Furthermore, the plaintiffs presented no circumstantial evidence that the Sheriff acted in response to the plaintiff's equal pay demands. Moreover, the *plaintiffs never confronted the Sheriff with their demands and at best the Sheriff had only a vague awareness that matrons in general were demanding equal pay.* After careful examination of the record, we can find no evidence to infer that the Sheriff knew the plaintiffs, and not Holiday and Firth, were raising equal pay claims. Only if there is

evidence that the Sheriff actually knew that the plaintiffs raised such claims, rather than other matrons, can we infer that the Sheriff gave negative recommendations to the plaintiffs and positive recommendations to the other matrons for vindictive reasons. *The plaintiffs presented no such evidence. Having not shown that the defendants were aware which matrons were actively supporting the claim for equal pay, the plaintiffs have not proved the necessary link between their demands and the defendant's adverse action that would establish a prima facie violation of § 704(a).* 632 F.2d 1303, 1316. (Emphasis supplied)[7]

Petitioner also contends that respondent failed to prove a *prima facie* or ultimate violation of § 704(a) because he failed to prove that the *form* of his opposition activity, picketing, etc., was a protected means of ex-

7. Similarly, here, there is absolutely no record evidence that respondent, Mr. Brass, or anyone else confronted petitioner with any claims of discrimination prior to the picketing, boycott or refusal to rehire. The panel majority made no finding that petitioner was aware, prior to the refusal to rehire, of respondent's claims of unlawful employment practices as contrasted with awareness of his picketing. In these circumstances respondent failed to establish a *prima facie* case. See also *Balderas v. LaCasita Farms, Inc.*, 500 F.2d 195 (5 Cir. 1974).

Factually, the record demonstrates that the purpose of FPIA and respondent in picketing petitioner, and others, were predominantly social, not employment related, and certainly not focused on any perceived unlawful employment practices of petitioner. Social grievances are certainly not synonomous with unlawful employment practices. In *EEOC v. Del Rio National Bank*, 12 FEP 1668, 1671 (D.C. Tx. 1975), the Court correctly noted that a female employee who was an outspoken advocate of women's rights and was critical of a community and its schools, in addition to criticizing her employer, was not engaged in protected § 704(a) activity because such opposition is not related to employment practices, but rather includes ideas relating to abortion, marriage and the family. 12 FEP 1668, 1670, n.2. See also *Women Employed v. Rinnella & Rinnella*, supra. Similarly, in *Hochstadt v. Worcester Foundation*, supra, the Court indicated that engaging "in political activities for women's liberation" was not protected opposition activity. 545 F.2d 222, 230. Since petitioner was unaware that respondent's picketing activity was in opposition to unfair employment practices, no *prima facie* case was established.

pressing his opposition. The district court found as fact that petitioner failed to recall respondent from layoff due to his activity of "picketing, boycott and the like". On appeal, petitioner did not contend that this factual finding was clearly erroneous, but rather accepted it, while contending, as a matter of law, respondent's picketing and boycott activity was not protected opposition activity and petitioner was within its lawful rights in refusing to rehire respondent because of those activities.[8] The panel majority affirmed, and for that matter embellished, the district court's factual holding, and held that petitioner could not raise the unlawfulness of respondent's "opposition" activity as a reason for its refusal to rehire respondent because it had not done so in the district court. This was clear error.

majority affirmed, and for that matter embellished, the district court's factual holding, and held that petitioner could not raise the unlawfulness of respondent's "opposition" activity as a reason for its refusal to rehire respondent because it had not done so in the district court. This was clear error.

As hereinbefore noted, in § 704(a) cases the appellate courts have consistently held that to establish a *prima facie* case *a plaintiff must prove:* (1) statutorily protected expression; (2) an adverse employment action, and; (3) a causal link between the protected expression and the adverse action. *Employment Discrimination Law,* supra. Even the Fifth Circuit has so held.[9] *Smalley v. City of Eatonville,* 640 F.2d 765, 769 (5 Cir. 1981); *Whatley v.*

8. Of course if petitioner had recalled white employees who had engaged in similar activity, a showing which respondent did not make, petitioner would have violated § 703(a). See *McDonnell Douglas Corp. v. Green,* supra; *Mosley v. General Motors Corp.,* 497 F.S. 583, 23 FEP 1637, 1642 (E.D. Mo. 1980).

9. The panel majority in this case recognized, indeed quoted, the necessary elements but then twisted the requirements on their ear.

No less than fifteen times, the panel majority speaks of petitioner's "responsibility" or burden to raise the issue in the trial court. (Id. pp. A-34-36). As can be seen, the panel visits the entire responsibility [illegible] the development of this issue upon petitioner. The panel's rulings in this regard are not warranted by case law, the proceedings in the trial court, nor is its own opinion internally consistent on this point. The panel claims that this issue was raised for the first time on appeal. The record clearly establishes that the issue was raised and litigated in the trial court.

The respondent's Complaint makes *no*, we repeat *no*, reference to § 704(a). In its violations of law section, the Complaint alleges only that respondent was not recalled because of his race, a violation of § 703 *not* § 704(a). Under the Federal Rules of Civil Procedure it is a plaintiff's responsibility to provide notice of his claims. Rule 8, FRCP.

Accordingly, when it served its answer generally denying the Complaint allegations, petitioner was not under notice that there was a § 704(a) issue. Petitioner did deny factual allegations that the boycott and picketing was peaceful, that it had refused to employ blacks except in menial positions and that it was aware of respondent's civil rights activity. Thus, to the extent it can be said there was any § 704(a) pleading by respondent, the underlying facts were put in issue. If the issue was *inartfully* plead, respondent deserves his share of the responsibility and the Court is in error in repeatedly referring to petitioner's "responsibility" to raise or narrow the issues.

Under the circumstances, petitioner met its pleading burden under Rule 8, FRCP. In these circumstances, the panel majority's statement in footnote 14 that " . . . defendant did not raise this issue in its pleadings . . ." is somewhat less than even handed and certainly not construing the pleadings in a way so as to do substantial justice. See Rule 8(f), FRCP.

The form of plaintiff's opposition activity and defendant's response was aired in Interrogatories. In the pretrial order the contested issues of fact included whether respondent engaged in civil rights activity, whether petitioner was aware of those activities and whether respondent was not recalled because of those activities.

Importantly, the nature of the picketing, petitioner's response thereto and its impact upon petitioner was fully explored at trial. Some of the evidence was offered by respondent through witnesses called by him thus obviating the need for petitioner to repeat the testimony. Other evidence was adduced by petitioner's cross examination and through its witnesses. In these circumstances, the Court's criticism that petitioner did not raise the issue or offer any evidence in the trial court is wholly in error.

A *fair* reading of the entire record shows the panel decision is in error because petitioner fulfilled its responsibility to raise the issue and present evidence thereon in the trial court. When a respondent did not mention § 704(a) in his Complaint or the pre-trial order, it runs counter to fair and impartial adjudication to conclude that it was petitioner's responsibility to "narrow the issues."'

Metropolitan Atlanta Rapid Transit Authority, 632 F.2d 1325, 1328 (5 Cir. 1980); *Jefferies v. Harris County Community Action Association*, 615 F.2d 1025, 22 FEP 974 (5 Cir. 1980);[10] *Rosser v. Laborers International Union, Local 430*, 616 F.2d 221 22 FEP 1274 (5 Cir. 1980)[11] cert. den. 66 L.Ed.2d 112 (1980).

In all § 704(a) cases proof of a protected form of expression is a necessary element of violation — a *prima facie* violation and/or an ultimate violation. See *Employment Discrimination Law*, supra. The panel majority concluded that once petitioner's articulated reason for not recalling respondent (lack of reapplication) was rejected as pretextual, petitioner failed in its rebuttal burden and the case was over. The Court made no finding that the *form* of respondent's opposition activities was protected because it found that petitioner failed to raise the issue in the trial court and it therefore refused to consider the issue.[12] Whether the form of respondent's opposition activities is protected is an issue in every § 704(a) case. Thus, the Court was in error in refusing to consider the issue, in finding that respondent had proven a *prima facie* case without proving a *protected form* of expression, in finding that it was petitioner's burden to prove the form of respondent's opposition unprotected, and in finding respondent had proven a violation of § 704(a) without proving that the form of his opposition activity was protected.

10. In *Jefferies*, eg. the Court held "... *[plaintiff] has not shown* any need for ... *she has not established* ... and *has not made* any colorable claim that she reasonably believed there was a need to act as she did. *Nor has [plaintiff] attempted to show* that the grievance procedure ... was inadequate." 22 FEP 974, 1981. (Emphasis added).

11. While the *Rosser* Court seemingly concluded in affirming a *summary judgment*, that plaintiff established a *prima facie* case, it was her very same proof which "left herself out in the rain" and resulted in the Court finding her opposition activity unprotected. 22 FEP 1274, 1276.

12. Ironically, the District Court considered the issue, albeit under an erroneous view of controlling law, infra, and found picketing etc. protected. (App. D).

The panel's failure to properly deal with this issue apparently stems from its basic misunderstanding of the allocation of burdens and presentation of proof in a Title VII case alleging discriminatory treatment. See *McDonnell Douglas Corp. v. Green,* supra; and, *Texas Dept. of Community Affairs v. Burdine,* supra. The panel's misunderstanding is clear from the uncertainty and internal inconsistency of its own opinion. It begins by quoting the necessary elements from *Smalley v. City of Eatonville,* supra, App. A, p. A-10.

Thus, initially the panel perceived it to be part of respondent's *prima facie* case to prove "statutorily protected expression" which certainly includes proof of a protected *form* of expression. Nevertheless, the panel concluded that because the only reason "articulated" by petitioner for failing to recall respondent was rejected by the trial court, petitioner had not met its "rebuttal burden" and plaintiff wins!

McDonnell Douglas and *Burdine* require respondent to prove a *prima facie* case and, if done, the defendant to "articulate", *or* to produce evidence of, *not prove,* a legitimate non-discriminatory reason for its action. Here, the Court shifted the burden without respondent proving a statutorily protected form of expression. Even if the burden had shifted, petitioner *need not persuade* the Court that it was actually *motivated* by the proffered reasons. *Burdine,* at 216. Here, the trial court rejected petitioner's proffered reasons and found that it was respondent's civil rights activity which motivated petitioner's failure to recall.[13] Petitioner, in fact, in-

13. Thus, respondent proved petitioner's articulated reason did not motivate petitioner in failing to recall him. However, if petitioner was within its lawful rights in not recalling respondent for *unprotected* opposition activity, respondent could still have shown discrimination in failing to recall for picketing by showing whites who picketed on other occasions were recalled. This would have been part of respondent's *prima facie* § 703(a) case. See *Mosley v. General Motors*

troduced evidence to that effect and accepted that factual finding as not being clearly erroneous.[14] But, this finding does not end the inquiry because, as *Burdine* makes very clear, plaintiff *always retains* the ultimate burden of persuasion which never shifts to defendant. Thus, the panel's decision to end the inquiry after petitioner's proffered reason was rejected was error.

Had the panel majority reached the issue of whether respondent had met his burden of proving that the form of his opposition activity was protected it would have had to conclude as a matter of law it was not. See eg. *Green v. McDonnell Douglas Corp.*, 463 F.2d 337, 341 (8 Cir. 1972) mod. on other ground 463 F.2d 352 (8 Cir. 1972) and remanded on other grounds sub nom *McDon-*

Corp., supra. Thus, contrary to the panel opinion (App. A, pp. A-33-34) responsibility for failure to show pretext was respondent's alone. Cf. *Rhode v. K. O. Steel Castings, Inc.*, 649 F.2d 317, 26 FEP 308 (5 Cir. 1981).

13. Thus, respondent proved petitioner's articulated reason did not motivate petitioner in failing to recall him. However, if petitioner was within its lawful rights in not recalling respondent for *unprotected* opposition activity, respondent could still have shown discrimination in failing to recall for picketing by showing whites who picketed on other occasions were recalled. This would have been part of respondent's *prima facie* § 703(a) case. See *Mosley v. General Motors Corp.*, supra. Thus, contrary to the panel opinion (App. A, pp. A-33-34) responsibility for failure to show pretext was respondent's alone. Cf. *Rhode v. K. O. Steel Castings, Inc.*, 649 F.2d 317, 26 FEP 308 (5 Cir. 1981).

14. The district court made no express factual findings as to the reason for the civil rights activity or whether the manner of *expression* was protected. The panel majority supplied those findings as implicit. (App. A, pp. A-21-22) The reason for this failure by the district court, discussed more fully infra, was the district court's misunderstanding of the controlling law.

nell Douglas Corp. v. Green,[15] supra; *Hochstadt v. Worcester Foundation,* 425 F.Supp. 318 (D.C. Mass. 1976), aff'd 545 F.2d 222 (1 Cir. 1976); *Jefferies v. Harris County Action Assoc.,* supra; *Rosser v. Laborers International Union,* supra; *Garrett v. Mobile Oil Corp.,* 531 F.2d 892 (8 Cir. 1976); *Bullock v. Mumford,* 509 F.2d 384 (C.A. D.C. 1974); *Pendelton v. Rumsfeld,* 22 FEP 733 (C.A. D.C. 1980); *McFarland v. Upjohn Co.,* 17 FEP 743 (E.D. Pa. 1978); *King v. Illinois Bell Telephone Co.,* 476 F.Supp. 495 (N.D. Ill. 1978); *Mosley v. General Motors Corp.,* supra, Cf. *Emporium Capwell Co. v. WACO,* 420 U.S. 50, 49 L.Ed.2d 12 (1975).

Applying the test of these cases to the facts of this case compels the conclusion that plaintiff's actions in "picketing, boycott and the like" were unprotected. What could be more disloyal to one's own employer[16] than to urge all customers to cease patronizing his business? Respondent here succeeded and the record establishes the boycott was very effective or, as Mr. Brass put it, "one hundred percent effective". Mr. McLemore's testimony confirmed the effectiveness of the boycott. Respondent unfairly and untruthfully labled his employer as a racist. Respondent, if he had any real complaints with his employer, chose not to give his employer an opportunity to informally resolve them, but rather went right to the public with them and sought to damage his employer's interest. The record in this case bears no indication of any conduct by petitioner

15. The Supreme Court did not have the § 704(a) issue before it. The Eighth Circuit's dismissal of that claim was not appealed. 36 L.Ed.2d 668.

16. The panel majority seemed to emphasize the fact that respondent was *laid off* at the time. This does not eliminate his status as an employee. A laid off employee who has a reasonable expectancy of recall is considered an employee under the NLRA and Title VII.

which warranted such action. The record bears out that petitioner was instrumental in resolving the underlying disputes.

Cases decided under the NLRA are also instructive. There, a balance must be struck between the employee's right to engage in concerted or union activity and the employer's right to run his business and protect his investment. In *NLRB v. Local 1229, I.B.E.W. (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464, 98 L.Ed. 195 (1953), the Court struck the balance in favor of the employer and held employee conduct in distributing disparaging handbills in the context of *lawful* picketing to be unprotected. The Court observed:

> ". . . there is no more elementary cause for discharge of an employee than disloyalty to his employer. It is equally elemental that the Taft-Hartly Act seeks to strengthen, rather than weaken, that cooperation, continuity of service, and cordial contractual relation between employer and employee that is borne of loyalty to their common enterprise. 346 U.S. 464, 472.

Importantly, in *NLRB v. Red Top, Inc.*, 455 F.2d 721 (8 Cir. 1972), an employee's conduct in *threatening* to take complaints to his employer's customer was held to be unprotected and grounds for discharge. See also *NLRB v. Pincus Brothers, Inc.*, 620 F.2d 367 (3 Cir. 1980); *American Arbitration Association, Inc.*, 233 NLRB 71 (1977); *Firehouse Restaurant*, 220 NLRB 818 (1975); *Paterson-Sargent Company*, 115 NLRB 1627 (1956); *Dade Tire Company*, 244 NLRB No. 35 (1979).

The failure of respondent to confront petitioner with any claimed discrimination which he supposedly opposed in his picketing and boycott activity, or to seek voluntary peaceful resolution through appropriate

government agencies, is also significant in terms of the purposes of § 704(a) and Title VII in general. In *Berg v. LaCrosse Cooler Co.*,[17] supra, the Court stated as follows:

> Congress enacted Title VII to assure equality of employment opportunities by eliminating those practices that discriminate on the basis of sex."Cooperation and voluntary compliance were selected as the preferred means for achieving this goal." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 7 FEP Cases 81, 84 (1974). The District Court's literal reading undermines Title VII's central purpose, the elimination of employment discrimination by informal means; destroys one of the chief means of achieving that purpose, *the frank and nondisruptive exchange of ideas between employers and employees;* and serves no redeeming statutory or policy purposes of its own. Section 2000e—3(a) plays a central role in effectuating these objectives. By protecting employees from retaliation, *it is designed to encourage employees to call to their employers' attention discriminatory practices of which the employer may be unaware or which might result in protracted litigation to determine their legality if they are not voluntarily changed.* 612 F.2d 1041, 1044 (emphasis supplied)

See also *Sias v. City Demonstration Agency*, supra; *Hearth v. Metropolitan Transit Commission*, supra; *Hearn v. Donnelly & Sons Co.*, 460 F.Supp. 546 (N.D. Ill. 1978); *EEOC v. Johnson Co.*, 18 FEP 896 (D.C. Minn. 1978). If protection to provide opportunity for con-

17. While the *Berg* Court applied the reasonable belief test under very hard facts, supra, p. 10, its policy statement applies herein to petitioner's argument.

ciliatory, informal adjustment is a purpose of § 704(a), as it surely must be, a requirement that the grievance sought to be adjusted be brought to the employer's attention, and/or appropriate government agencies, before agressive, hostile coercive action damaging to the employer's business is taken, is essential. Otherwise, the secondary purpose of such conciliation and informal adjustment — avoidance of costly, protracted litigation — will not, as this case demonstrates, be avoided.

C. The Panel Majority Inappropriately Departed From The Accepted And Usual Course Of Judicial Proceedings By Going Outside The Record Evidence And Supplying A Critical Factual Finding Not Made By The District Court.

Assuming *arguendo* that the "reasonable belief" test adopted by the panel majority is the correct interpretation of § 704(a), petitioner contends that the panel majority erred in supplying that critical factual finding admittedly not made by the district court. The panel majority recognized that the district court "made no explicit finding that respondent's opposition was based upon a reasonable belief that McLemore's hiring and promotional policies violated Title VII . . ." (App. A, pp. A-21-22) but concluded that "such a finding is implicit and is sufficiently supported by evidence in the record." (Id. p. A-22) Nothing could be further from the truth. There is not, as Judge Coleman wrote in dissent, ". . . a single specific fact that would support a finding of reasonable belief." (Id., p. A-37).

A finding of "reasonable belief" on the part of respondent was not implicit in the district court's decision and should not be supplied by the panel majority. Such a practice is a serious departure from the accepted and usual course of judicial proceedings. The operative findings by the district court are hereinbefore quoted,

supra, p. 6; see also App. D pp. A-41-47. The district court stated that it was construing § 704(a) as interpreted by the Supreme Court in the *McDonnell Douglas* case. See *McDonnell Douglas Corp. v. Green*, supra. The problem with this construction is that *McDonnell Douglas* was not a § 704(a) case but rather a § 703 case! The § 704(a) aspect of the *McDonnell Douglas* case was not before the Supreme Court and was decided adversely to its plaintiff in the Court of Appeal. *Green v. McDonnell Douglas Corp.*, supra. The Supreme Court decision, relied upon by the district court for its rationale, had nothing at all to do with "reasonable belief" and thus the panel majority should not have it implicit[18] in the district court's decision.

Furthermore, the panel majority should not have found such a finding sufficiently supported by the record evidence. The panel majority states: "According to the plaintiff, the purpose of the boycott and picketing was to oppose McLemore's discrimination in hiring and promotion." (App. A, pp. A-9-10). Where is that testimony? It's not in the official record of respondent's testimony.[19] The panel majority makes no record reference to support this statement. It's not even in the unsworn complaint which the panel quotes and relies upon as evidence in its very next sentence. (Id. p. A-10) The Complaint, an instrument drafted by a lawyer, is not

18. In *Sias v. City Demonstration Agency*, supra, the Court supplied a finding of reasonable belief as implicit where the evidence included historical badges of discrimination such as no posting of vacancies and strong statistical evidence of discrimination. No such evidence is present here.

19. In footnote 8, (App. A, p. A-11) the panel majority similarly stated: "... According to plaintiff, McLemore failed to hire blacks in or promote blacks to certain positions *solely* because of their race ..." There is no such testimony in the official record and again the panel majority makes no record reference. In this instance, there is *not even an accusation* using the word "solely" or testimony in any way suggesting a racial motive. This statement is totally without evidentiary support and leaves a practicing attorney bewildered.

evidence and cannot be used to support factual findings, but here the quoted portion falls short of accusing petitioner of *discrimination.* Importantly, if respondent had a reasonable belief that this unsworn allegation was true he would have repeated it in his sworn testimony and included it as a substantive violation in his EEOC charge and in the Complaint. He did not because he had no reasonable belief that it was true.

The next piece of "evidence" which the panel majority cites to support this "implicit", but admittedly non-existent, finding of "reasonable belief" is: "An *affidavit* prepared for the EEOC by plaintiff stated, 'In December the Franklin Parish Improvement Organization organized and boycotted *downtown stores* because they refused to hire blacks.' " (Id.) That accusation is not *evidence* of a reasonable belief in respondent that *petitioner discriminatorily refused to hire blacks.* Who did petitioner refuse to hire? When? For what position? Was there a vacancy? Why were they refused hire? Answers to these questions could provide evidence of discrimination but they were not asked. Contrariwise, here only a naked *accusation* is made, but respondent made no effort to prove, and it was his burden to do so, the reasonableness of the accusation. Importantly, the accusation was rebutted by petitioner's evidence that *as to it,* not necessarily downtown stores, the accusation was untrue. The statistical evidence in the record showed that fifteen (15) of the twenty (20) co-workers of respondent were black. Again, if respondent had believed this accusation he would have included it as an issue in the case. It was not included because respondent had no reasonable belief in its truth.

The next "evidence" which the panel majority cites to support the "implicit", but admittedly non-existent finding of "reasonable belief" is: "Russell Brass, a witness for plaintiff, testified that the purpose of the

boycott was 'to get some blacks hired at *the stores.*' " (Id., p. A-10) So what? How is Russell Brass' statement of purpose evidence of a belief, reasonable or otherwise, in respondent of hiring or promotion discrimination by petitioner? Many boycotts are conducted to obtain jobs, but it is a complete *non sequitur* to infer from that fact some type of promotional or hiring discrimination. Furthermore, this testimony is not even keyed to this particular petitioner.

The next "evidence" cited by the panel majority to support the "implicit", but admittedly non-existent, finding of "reasonable belief" is:

> The plaintiff testified that when the Improvement Organization was formed, it began investigating "why black people could not get some jobs." Id. at 27. In addition, he testified that immediately after the formation of the organization, "we started to work — worked at getting people jobs; going down and finding jobs — some could not get jobs." Id.

Again, there is no testimony by respondent, a la *McDonnell Douglas,* that he knows John Doe, a black applicant who was a qualified applicant for a vacant position at petitioner's store who was refused employment and a caucasian hired. No, there is no evidence as to the factual basis for his accusations which, in themselves, fall far short of even *accusing petitioner of unlawful employment practices.* It is not a § 703(a) unlawful employment practice to refuse to hire a black. It is only an unlawful employment practice to refuse to hire a black *because he or she is black.* All that can be said of this evidence is that it shows FPIA was interested in why blacks could not get jobs at *many places.* It again falls far short of establishing that *respondent* had a reasonable belief that *petitioner* discriminatorily refused to hire or promote

blacks.

The next "evidence" cited by the panel majority to support the "implicit", but admittedly non-existent district court finding of respondent's reasonable belief is really ironic. The panel majority relies upon the predicate of a question asked by respondent's attorney to Mr. McLemore, the answer to which produced *evidence* that any such belief was not reasonable as to petitioner:

> Q. *It was alleged* that you and the other merchants would not hire blacks within a supervisory position and dollar handling positions, is that right?
>
> A. That is incorrect so far as the McLemore's were concerned.
>
> Q. That was alleged, right?
>
> A. Right. (Id., pp. A-10-11).

A "catch 22" for certain! The writers of every evidence text ever published would surely be amazed by a judicial finding based on this "evidence". Respondent's state of mind, not his attorney's , or Mr. McLemore's is important!

The final "evidence" offered by the panel decision in this regard is *deposition testimony* of J. W. McLemore[20] which was *not offered in evidence* and therefore not considered by the district court. It should not have been considered by the panel. In any event, the quoted testimony suffers from the same defects as the testimony referred to in the previous paragraph.

20. Excerpted at App. A, p. A-11).

In summary, petitioner contends that Judge Coleman is right when he states that is *no* evidence to support a finding of reasonable belief. Importantly, the absence of the usual type of evidence in Title VII cases is probably the most important evidence of no "reasonable belief". There is no supportive statistical applicant flow data; there is no adverse statistical evidence of promotion decisions; there is no evidence of racial slurs; there is no evidence of specific refusals to hire or refusals to promote; and, there is no evidence of personal racial discrimination against respondent or his witness, Mr. Brass, both of whom were long time employees of petitioner.[21] The evidence in the record of petitioner's employment policies is all favorable. As noted, fifteen (15) of respondent's twenty (20) co-employees were black. Respondent's witness, Mr. Brass, had been promoted to a responsible supervisory position. Petitioner employed blacks in supervisory and money handling positions. Respondent made no claims in this lawsuit of promotional or hiring discrimination. No other "charges" have been filed by others against petitioner. There is no evidence to support a finding that respondent entertained a reasonable belief that petitioner engaged in unfair employment practices. Much like many newspaper headlines, there are strong accusations, but unlike journalists, the courts must be true to the record evidence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

21. In fact respondent's personal racial discrimination claims were rejected by the district court and abandoned on appeal. (App. A, p. A-8, footnote 6).

Respectfully submitted,

CHAFFE, McCALL, PHILLIPS,
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By:_____

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CERTIFICATE

I hereby certify that a copy of the above and foregoing Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit has been this day forwarded to Respondent's counsel of record, R. James Kellogg, by mailing him a copy, postage prepaid, to P. O. Box 56301, New Orleans, Louisiana, 70156.

New Orleans, Louisiana, this _____day of November, 1981.

_____

Appendix

81-986

NO.

FILED
NOV 25 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

McLEMORE'S WHOLESALE & RETAIL STORES, INC.,

Petitioner

vs.

CHARLES PAYNE,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ADDENDUM TO PETITION FOR WRIT OF CERTIORARI

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT A

NO. 79-3674

PAYNE

versus

McLEMORE'S WHOLESALE & RETAIL STORES

September 4, 1981

CIVIL RIGHTS ACT OF 1964

1. Retaliation—Opposition—Prima facie case
► 108.4511 ► 108.7333

Individual who seeks to establish that he was engaged in statutorily protected expression, which is first element of prima facie case of retaliation for engaging in opposition to discrimination, must show that his conduct was in opposition to employer's unlawful employment practice.

2. Retaliation—Opposition—Prima facie case
► 108.4511 ► 108.7333

Laid-off black employee who claims that employer refused to hire him in retaliation for his opposition to discrimination established that picketing and boycott of employer's store was statutorily protected expression by showing that its purpose was to oppose employer's discrimination against blacks in hiring and promotion.

3. Retaliation—Opposition—Prima facie case
► 108.4511 ► 108.7333

Laid-off black employee was not required to make out prima facie showing that employer discriminated against blacks in employment opportunities to make out prima facie showing that employer retaliated against him for opposing discrimination.

4. Retaliation—Opposition—Prima facie case
► 108.4511 ► 108.7333

Individual who seeks to make prima facie showing that his opposition to employer's practices is statutorily protected showing must demonstrate that he had reasonable belief that employer was engaged in unlawful employment practices.

5. Retaliation—Opposition—Prima facie case
► 108.4511 ► 108.7333

Laid-off black employee established that employer did not rehire him in retaliation for his opposition to unlawful discrimination by showing that his opposition was based on reasonable belief that employer's hiring and promotion policies violated Title VII, that his boycott and picketing activities were in opposition to these policies, and that employer's failure to rehire him occurred relatively shortly after boycott and picketing.

6. Retaliation—Opposition—Rebuttal
► 108.4511 ► 108.7335

Employer's assertion that it did not rehire laid-off black employee after he boycotted and picketed employer's store because he did not reapply for job rebutted his prima facie showing that employer discriminated against him for opposing discrimination.

7. Retaliation—Opposition—Pretext
► 108.4511 ► 108.7338

Employer's assertion that it did not rehire laid-off black employee because he did not reapply for job is pretext for retaliation against him for opposing discrimination by picketing and boycotting employer's store, where he did reapply for position, employer knew of his conduct, and there is evidence supporting finding of causal relationship between employer's failure to rehire him and his participation in protest.

8. Retaliation—Opposition ► 108.4511

Employer's failure to offer any evidence at trial regarding form of laid-off black employee's conduct in picketing and boycotting its store precludes it from arguing on appeal that his conduct is outside protection of opposition clause of Section 704(a) of Civil Rights Act of 1964, since this issue is not pure question of law that would not require development of additional facts, and miscarriage of justice would not result from failure to consider issue on appeal.

Appeal from the United States District Court for the Western District of Louisiana

AFFIRMED.

R. James Kellogg, New Orleans, La., for appellee.

G. Phillip Shuler, David L. McComb, and Jarrell E. Godfrey, Jr., New Orleans, La., for appellant.

Before COLEMAN GARZA, and SAM D. JOHNSON, Circuit Judges.

FULL TEXT OF OPINION

SAM D. JOHNSON, Circuit Judge:—

This is a Title VII action alleging that in early 1971, defendant McLemore's Wholesale & Retail Stores, Inc. failed to rehire plaintiff Charles Payne because of his participation in activities protected by section 704(a) of the Civil Rights Act of 1964. 42 U.S.C.A. § 2000e—3(a). The district court concluded that plaintiff successfully carried his ultimate burden of proving discrimination. The district court found that plaintiff established a prima facie case of discrimination under section 704(a) by showing that the employer's failure to rehire plaintiff was caused by plaintiff's participation in boycott and picketing activities in opposition to an unlawful employment practice of the defendant. In addition, the district court found that plaintiff proved that the employer's proffered explanation for its failure to rehire the plaintiff — that plaintiff failed to reapply for a job with the employer — was merely pretextual. Because the finding of retaliatory discrimination is supported by requisite subsidiary facts, we affirm the district court judgment for the plaintiff.

During the period of time in which the actions challenged by plaintiff took place, McLemore's Wholesale & Retail Stores was a commercial partnership whose partners were J. W. McLemore, Jr., and Quinten McLemore, both of Winnsboro, Louisiana. The partnership's operations included McLemore Wholesale Grocery, McLemore Jitney Jungle (a retail grocery operation), McLemore Farm Store (a light hardware, sporting goods, western wear, feed, seed, fertilizer, and chemical sales store), and Big M. Mobile Homes (a retail mobile home outlet). McLemore's Wholesale & Retail Stores, Inc., a Louisiana corporation, was incorporated August 26, 1975. In 1976, when this lawsuit was filed,

the operation of McLemore's Wholesale & Retail Stores, Inc. had not changed significantly from the time it was a partnership; it continued to maintain the same operations that it had for the past several years. The officers, principal stockholders, and two of the directors of the corporation were J. W. McLemore, Jr., and Quinten McLemore.[1]

Althoung there is some confusion with respect to the exact time at which plaintiff began working for defendant, it appears that plaintiff began his employment with defendant about May or June 1966. Plaintiff originally worked in McLemore's fertilizer plant.[2] The operation of the plant was seasonal in nature since the demand for fertilizer was dependent upon the farmers' planting seasons. During the first two years of plaintiff's employment with defendant, he was laid off for three months each year during the seasonal decline in work. In later years, during the off-season plaintiff was not laid off, but was instead shifted to positions in other parts of the defendant's operations. As a result, during his employment with McLemore's, plaintiff worked as a fertilizer plant operator, a truck driver, a warehouse worker, a dock worker, and a farm store porter.

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1. On July 15, 1976, defendant McLemore's Wholesale & Retail Stores, Inc. filed a motion to dismiss for failure to state a claim upon which relief could be granted. Defendant noted that plaintiff's complaint challenged actions of the defendant taken in early 1971. Defendant then contended that it did not exist in 1971; rather, it acquired its present status as a corporation on August 26, 1975, when it was incorporated under the laws of Louisiana. On July 28, 1976, the district court denied defendant's motion to dismiss, apparently because of the substantial identity between the former partnership and the present corporation. This ruling is not challenged by defendant on appeal. (The defendant will hereinafter be referred to simply as McLemore's.)

2. McLemore's owned and operated the fertilizer plant until January 1978, at which time the plant was sold.

In November 1970, plaintiff was once again laid off due to the seasonal business decline. Two other black employees and two white employees were laid off at the same time. About a month later, plaintiff became involved in the formation and organization of the Franklin Parish Improvement Organization, a non-profit civil rights organization. The formation of the Improvement Organization was precipitated by an incident involving two black children who were turned away from a public swimming pool. The organization was interested in improving social conditions of blacks in Franklin Parish, and it focused especially on the need to get blacks hired in retail stores in money-handling and supervisory positions in order to improve the treatment that blacks received while shopping in stores. Shortly after its formation, the members of the organization decided to boycott several retail businesses, including those of defendant in Winnsboro. Plaintiff organized and implemented the boycott and was actively involved in picketing McLemore's Jitney Jungle Food Stores. Defendant knew of plaintiff's involvement in the boycott and picketing. Moreover, the boycott and picketing were effective and defendant's business suffered as a result.

In previous years when he had been laid off, plaintiff had always gone back to work for defendant when the work picked back up. In the year of the boycott, however, he was not recalled or rehired.[3] In February 1971, plaintiff filed a charge of discrimination against

3. Of the four other employees who were laid off at the same time as plaintiff, only one was rehired — a black employee who was not involved in the boycott or picketing by the Franklin Parish Improvement Organization. Both plaintiff and Russell Brass (the other black employee who was laid off and not rehired) were involved in the boycott and picketing. According to defendant, the employee who was rehired was the only one of the five employees who were laid off that reapplied for a job.

McLemore's with the Equal Employment Opportunity Commission (EEOC). The charge alleged that plaintiff was not called back to work because he had attended a civil rights meeting. A February 1974 letter from the EEOC inviting the parties to engage in conciliation efforts characterized plaintiff's charge as alleging that defendant "failed to recall him following a layoff because of his race . . . and because of his participation in Civil Rights activities." Record, vol. 1, at 106. The EEOC ultimately issued a right to sue letter on March 23, 1976.

On June 17, 1976, plaintiff filed this action in federal district court alleging that defendant's failure to rehire plaintiff was a result of plaintiff's race and his civil rights activity.[4] In its answer, McLemore's denied that it had committed any discriminatory actions, and asserted that the reason the plaintiff was not rehired was because he failed to reapply for a position with McLemore's after he was laid off. The district court held that plaintiff did reapply for his job, but that he was not rehired because of his participation in boycotting and picketing activities. The court further found that participation in the boycott and picketing was protected activity under section 704(a) of Title VII; in other words, the district court concluded that the boycott and picketing were in opposition to an unlawful employment practice of the defendant. The court awarded plaintiff back pay, costs, and attorneys' fees totalling $16,260.90.

The opposition clause of section 704(a) of Title VII provides protection against retaliation for employees who oppose unlawful employment practices committed by an

4. Although the plaintiff originally alleged racial discrimination against him, he did not pursue that allegation at trial and no contention of racial discrimination against the plaintiff is before this court.

employer. (Section 704(a) also contains a participation clause that protects employees against retaliation for their participation in the procedures established by Title VII to enforce its provisions. The participation clause is not involved in this lawsuit.) The opposition clause of section 704(a) provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . *because he has opposed any practice made an unlawful employment practice by this subchapter* . . .

42 U.S.C.A. § 2000e—3(a) (emphasis added).[5]

In this case, plaintiff contends that he was not rehired in retaliation for his boycott and picketing activities[6] which were, according to plaintiff, in opposition to unlawful employment practices committed by McLemore's. Plaintiff asserted that the unlawful employment practices his boycott and picketing activities were intended to protest were McLemore's discrimination against blacks in hiring and promotion — specifically, McLemore's failure to employ blacks in

5. Section 703(a)(1), which deals with unlawful employment practices, states in pertinent part that:

> (a) It shall be an unlawful employment practice for an employer —
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C.A. § 2000e—2(a)(1).

6. While plaintiff originally made allegations of racial discrimination against him, those contentions are not before this Court on appeal.

money-handling, clerking, or supervisory positions. In demonstrating his contentions at trial, plaintiff had the initial burden of establishing a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668, 5 FEP Cases 965 (1973). The burden than shifted to the defendant to articulate a legitimate, nondiscriminatory reason for the failure to rehire the plaintiff. Id. *See Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207, 25 FEP Cases 113 (1981). Finally, if the defendant carried his burden, the plaintiff was entitled to an opportunity to show that the defendant's stated reason for its failure to rehire plaintiff was in fact pretextual. *McDonnell Douglas,* 411 U.S. at 804, 93 S.Ct. at 1825; *Burdine,* 101 S.Ct. at 1093. *See Whatley v. Metropolitan Atlanta Rapid Transit Authority,* 632 F.2d 1325, 1327-28, 24 FEP Cases 1148 (5th Cir. 1980) (participation clause case).

[1, 2] "To establish a prima facie case under [section 704(a)] the plaintiff must establish (1) statutorily protected expression, (2) an adverse employment action, and (3) a causal link between the protected expression and the adverse action." *Smalley v. City of Eatonville,* 640 F.2d 765, 769, 25 FEP Cases 1059 (5th Cir. 1981); *Whatley,* 632 F.2d at 1328. The first element of the prima facie case — statutorily protected expression — requires conduct by the plaintiff that is in opposition to an unlawful employment practice of the defendant. Thus, for the plaintiff to prove that he engaged in statutorily protected expression, he must show that the boycott and picketing activity in which he participated was in opposition to conduct by McLemore's that was made unlawful by Title VII. According to the plaintiff, the purpose of the boycott and picketing was to oppose McLemore's discrimination against blacks in hiring and promotion. Plaintiff's complaint stated that the Franklin Parish Improvement Organization "engaged in

the peaceful boycotting of Winnsboro stores, among them McLemore's Jitney Jungle Food Stores, which had refused to employ blacks except in a few menial positions." Record, vol.1, at 2. An affidavit prepared for the EEOC by plaintiff stated, "In December the Franklin Parish Improvement Organization organized and boycotted downtown stores because they refused to hire Blacks." Id. at 104. Testimony was offered at trial indicating that McLemore's discriminated against blacks in employment opportunities and that the boycott and picketing were in opposition to the failure of blacks to be given clerking, money-handling, and supervisory jobs in McLemore's enterprises, as well as in other enterprises in Winnsboro, Louisiana. Russell Brass, a witness for the plaintiff, testified that the purpose of the boycott was "to get some blacks hired in the stores." 1st Supp. Record at 87. The plaintiff testified that when the Improvement Organization was formed, it began investigating "why black people could not get some jobs." Id. at 27. In addition, he testified that immediately after the formation of the organization, "we started to work — worked at getting people jobs; going down and finding jobs — some could not get jobs." Id. at 26—27. When plaintiff's attorney was cross-examining Mr. J. W. McLemore, Jr., the following interchange took place:

Q. It was alleged that you and the other merchants would not hire blacks within a supervisory position and dollar handling positions, is that right?

A. That is incorrect so far as the McLemores were concerned.

Q. That was alleged, right?

A. Right.

Id. at 119–20. In addition, at his deposition, when J. W. McLemore, Jr., was asked what the reason for the boycott was, he stated:

A. They claimed that — uh — the merchants in Winnsboro were unfair to — uh — blacks.

Q. How were they unfair, did they say?

A. Said they were not — uh — employing them in — uh — supervisory and — uh — sales capacity and — uh — where they handled funds, money.

Record, vol.2, at 288. Thus, there is substantial evidence to support the district court finding that the purpose of the boycott and picketing was to oppose defendant's discrimination against blacks in certain employment opportunities[7] — an unlawful employment practice under

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7. Defendant claims that plaintiff did not engage in the boycott and picketing to oppose unlawful employment practices of McLemore's. Instead, it is McLemore's contention that the boycott and picketing were conducted to publicize the issues of integration of public facilities and common courtesy to blacks. To support this allegation, defendant points to the incident that initiated the formation of the Franklin Parish Improvement Organization — two black children being turned away from the town's segregated public swimming pool. In addition, McLemore's points to testimony of Russell Brass, who stated at trial that, "[I]f a white lady was waiting on [a black customer] . . . and another white lady would come by then the . . . [saleslady] would . . . tell the black that they had to wait." 1st Supp. Record at 85. Although the Improvement Organization was, in part, occasioned by the position of blacks in Winnsboro in general, and although the boycott and picketing may have been to some extent a protest of this position, the district court's conclusion that the boycott and picketing activity was in opposition to unlawful employment practices of McLemore's is supported by substantial evidence.

section 703(a)(1).[8]

[3] Defendant argues, however, that plaintiff failed to establish his prima facie case because he failed to *prove* that defendant had committed any unlawful employment practices. Plaintiff responds that he was not required to *prove* the actual existence of those unlawful employment practices; instead, he asserts that it was sufficient to establish a prima facie case if he had a *reasonable belief* that defendant had engaged in the unlawful employment practices. We agree with plaintiff and conclude that it was not fatal to plaintiff's section 704(a) case that he failed to prove, under the *McDonnell Douglas* criteria for proving an unlawful employment practice under section 703(a)(1), that McLemore's discriminated against blacks in retail store employment opportunities.

The Ninth Circuit was apparently the first appellate court to decide whether the opposition clause of section 704(a) required proof of actual discrimination. *Sias v. City Demonstration Agency*, 588 F.2d 692, 18 FEP Cases 981 (9th Cir. 1978). In *Sias*, the plaintiff alleged that he was discharged by the City Demonstration Agency (an agency of the City of Los Angeles) in retaliation for his opposition to acts of racial discrimination by the City of Los Angeles. The City did not deny that plaintiff "was discharged for writing a letter of grievance to the Regional Administrator of the Department of Housing and Urban Development (HUD). Rather, it contend[ed] that, inasmuch as the trial court made no finding of actual discrimination, it [could not] be

8. See note 5 supra. Section 703(a)(1) provides in part that it is an unlawful employment practice for an employer to refuse to hire or to discriminate against an individual with respect to privileges of employment because of the individual's race. According to plaintiff, McLemore's failed to hire blacks in or promote blacks to certain positions solely because of their race. Thus, plaintiff contended that McLemore's engaged in unlawful employment practices and that plaintiff's boycott and picketing were in opposition to those unlawful employment practices.

held to have violated" section 704(a). Id. at 694. The Ninth Circuit concluded that "[s]uch a narrow interpretation . . . would not only chill the legitimate assertion of employee rights under Title VII but would tend to force employees to file formal charges rather than seek conciliation or informal adjustment of grievances." Id. at 695. The *Sias* court quoted extensively from *Hearth v. Metropolitan Transit Commission*, 436 F.Supp. 685, 18 FEP Cases 329 (D.Minn. 1977), which held that "as long as the employee had a reasonable belief that what was being opposed constituted discrimination under Title VII, the claim of retaliation does not hinge upon a showing that the employer was in fact in violation of Title VII." Id. at 688. The *Hearth* court went on to state:

> But this Court believes that appropriate informal opposition to perceived discrimination must not be chilled by the fear of retaliatory action in the event the alleged wrongdoing does not exist. It should not be necessary for an employee to resort immediately to the EEOC or similar State agencies in order to bring complaints of discrimination to the attention of the employer with some measure of protection. The resolution of such charges without governmental prodding should be encouraged.

The statutory language does not compel a contrary result. The elimination of discrimination in employment is the purpose behind Title VII and the statute is entitled to a liberal interpretation. When an employee reasonably believes that discrimination exists, opposition thereto is opposition to an employment practice made unlawful by Title VII even if the employee turns out to be mistaken as to the facts.

Id. at 688-89 (footnote omitted), quoted in *Sias*, 588 F.2d at 695. The Seventh Circuit has also adopted this position. *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 21 FEP Cases 1012 (7th Cir. 1980). In *Berg*, the plaintiff was discharged when she challenged her employer's failure to provide pregnancy benefits as sex-based discrimination. After she was fired, the United States Supreme Court ruled that a disability benefits plan does not violate Title VII because of its failure to cover pregnancy related disabilities. *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343, 13 FEP Cases 1657 (1976). The Seventh Circuit held that where the employee opposed a practice that she reasonably believed was an unlawful employment practice under Title VII, her opposition was protected from retaliatory discharge even where the practice was later determined not be an unlawful employment practice. The court concluded that to interpret the opposition clause to require proof of an actual unlawful employment practice

> undermines Title VII's central purpose, the elimination of employment discrimination by informal means; destroys one of the chief means of achieving that purpose, the frank and non-disruptive exchange of ideas between employers and employees; and serves no redeeming statutory or policy purposes of its own. Section 2000e–3(a) plays a central role in effectuating these objectives. By protecting employees from retaliation, it is designed to encourage employees to call to their employers' attention discriminatory practices of which the employer may be unaware or which might result in protracted litigation to determine their legality if they are not voluntarily changed.

612 F.2d at 1045.

The Fifth Circuit has not heretofore directly addressed the issue whether proof of an actual unlawful employment practice is necessary under the opposition clause, or whether an employee is protected from retaliation under the opposition clause if the employee reasonably believes that the employer is engaged in unlawful employment practices. To the extent that earlier Fifth Circuit cases provide guidance to this Court, however, they indicate that the reasonable belief test of the Seventh and Ninth Circuits comports with the decisions of this Circuit and the policies underlying Title VII. In *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1 FEP Cases 752, 71 LRRM 2347 (5th Cir. 1969), this Court held that an employee was protected by the participation clause of section 704(a) from discharge in retaliation for filing a charge with the EEOC, regardless of the truth or falsity of the contents of the charge. The Court stated that:

> There can be no doubt about the purpose of § 704(a). In unmistakable language it is to protect the employee who utilizes the tools provided by Congress to protect his rights. The Act will be frustrated if the employer may unilaterally determine the truth or falsity o charges and take independent action.

Id. at 1004-05. Thus, the Court held that where the communication with the EEOC satisfied the requirements of a "charge" the charging party could not be discharged for the writing and the court could not "either sustain any employer disciplinary action or deny relief because of the presence of . . . malicious material." Id. at 1007.[9]

9. Although this Court considers the reasoning of the *Pettway* decision to suport the reasonable belief test in opposition clause cases, at least one district court has viewed the *Pettway* case quite differently. The district court in *EEOC v. C & D Sportswear Corp.*, 398 F.Supp. 300, 10 FEP Cases 1131 (M.D.Ga.1975), held that "baseless accusations" were protected "only as a means of protecting access to the Commission." Id. at 305. Thus, that court concluded that the result in

The Ninth Circuit recognized that the "considerations controlling the interpretation of the opposition clause are not entirely the same as those applying to the participation clause," and that the opposition clause "serves a more limited purpose" than does the participation clause. *Sias*, 588 F.2d at 695. However, interpreting the opposition clause to require proof of an actual unlawful employment practice would "chill the legitimate assertion of employee rights under Title VII," id., just as surely as would interpreting the participation clause to require a truthful charge. On the other hand, interpreting the opposition clause to protect an employee who reasonably believes that discrimination exists "is consistent with a liberal construction of Title VII to implement the Congressional purpose of eliminating discrimination in employment." Id.

Pettway was limited to actions under the participation clause, and did not apply to actions under the opposition clause. The *C & D Sportswear* court held:

> Accordingly, the only reasonable interpretation to be placed on Section 704(a) is that where accusations are made in the context of charges before the EEOC, the truth or falsity of that accusation is a matter to be determined by the EEOC, and thereafter by the courts. However, where accusations are made outside the procedures set forth by Congress that accusation is made at the accuser's peril. In order to be protected, it must be established that the accusation is well-founded. If it is, there is, in fact, an unlawful employment practice and he has the right, protected by Section 704(a), to oppose it. However, where there is no underlying unlawful employment practice the employee has no right to make that accusation in derogation of the procedures provided by statute.

Id. at 306. We find the reasoning of the *C & D Sportswear* district court unpersuasive and the result unjustifiably restrictive. In *C & D Sportswear*, an employee called the president of the company a racist and was discharged for making that accusation. The district court reasoned that

> access to the EEOC must be protected. On the other hand, accusations of racism ought not to be made lightly. Unfounded accusations might well incite racism where none

> Plaintiff often expressed his belief that the AFL-CIO and its affiliates were not responding to the needs of black workers, that the union movement historically had been insensitive to the needs of black workers, that blacks tended to be exploited by unions for membership purposes, that blacks had been excluded from the union elective process and leadership positions and, that black workers should seek active roles in union affairs. Plaintiff also expressed his

This Court is also provided with some measure of guidance by *Doe v. AFL-CIO,* 405 F.Supp. 389, 17 FEP Cases 486 (N.D.Ga.1975), aff'd, 537 F.2d 1141, 17 FEP Cases 673 (5th Cir. 1976), cert. denied, 429 U.S. 1102, 97 S.Ct. 1127, 51 L.Ed.2d 552, 18 FEP Cases 1427 (1977). In that case, plaintiff, a union organizer for defendant AFL-CIO, alleged that he was discharged for his opposition to his employer's unlawful employment practices. The district court characterized plaintiff's opposition as follows:

> had previously existed. Were employees free to make unfounded accusations of racism against their employers and fellow employees, racial discord, disruption, and disharmony would likely ensue. This would be wholly contrary to Congress' intention that race be removed, as far as possible, as an issue in employment.

Id. at 305-06. While unfounded, inflammatory accusations of racism might, on balance, be found to provide the employer with a legitimate, nondiscriminatory reason for discharging an employee, this would neither require nor suggest that all unfounded accusations should be totally unprotected by the opposition clause of section 704(a). It is as important to protect an employee's right to oppose perceived discrimination by appropriate, informal means as it is to protect his right of access to the EEOC. An employee who engages in opposition activity should not be required to act at his own peril if it turns out that no unlawful employment practice actually exists, as long as the employee holds a reasonable belief that the unlawful employment practices do exist.

> view that the AFL-CIO leaders were regressive and lacked social awareness to the problems of black workers.

Id. at 391. The plaintiff claimed that he was fired because of these statements which, according to him, were made in opposition to the discriminatory practices of the AFL-CIO and its affiliates. The district court concluded that plaintiff was lawfully discharged because "he was not an effective worker and refused to follow the instructions of his superior." In addition, "his employer suspected him of submitting inaccurate expense vouchers and . . . he often bickered and quarreled over his assignments . . . ." Id. at 394. Thus, the district court concluded that the plaintiff had been discharged for legitimate and nondiscriminatory reasons.

In its findings of fact and conclusions of law, the district court noted that "[t]here has been no attempt to show by way of a statistical case or otherwise that the defendant has engaged historically in discriminatory employment practices." Id. at 392. There is no indication, however, that the court considered this to be fatal to plaintiff's section 704(a) case. Rather, plaintiff failed to recover because the employer was able to articulate legitimate, nondiscriminatory reasons for the discharge, and plaintiff was unable to show that those reasons were merely pretextual. Indeed, the district court stated, albeit in dicta, that:

> The peculiar aspects of this case are that the philosophy of the plaintiff deals with race-related matters and some of his statements tended to criticize the union movement for its alleged failure to recognize and promote the interests of blacks. These beliefs of the plaintiff are certainly protected and the plaintiff could

> not be discharged for holding and espousing them . . . . The Court is of the opinion that plaintiff could not be discharged from his job for holding and expressing his beliefs *whether valid or invalid.*

Id. at 394 (emphasis added). While it is not definitive, the Fifth Circuit affirmance of this case would seem to indicate approval of the position that an employee need not offer proof of actual unlawful employment practices by his employer in order to establish a prima facie case under section 704(a).[10]

[4, 5] To effectuate the policies of Title VII and to avoid the chilling effect that would otherwise arise, we are compeled to conclude that a plaintiff can establish a prima facie case of retaliatory discharge under the opposition clause of section 704(a) if he shows that he had a reasonable belief that the employer was engaged in unlawful employment practices.[11] While the district

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10. *Cf. Turner v. Texas Instruments, Inc.*, 555 F.2d 1251, 15 FEP Cases 746 (5th Cir. 1977) (where employer wrongly believes employee violated company policy, employer does not discriminate in violation of Title VII if it acts on that belief), overruled on other grounds, *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207, 25 FEP Cases 113 (1981).

11. The First Circuit has adopted a somewhat different test than have the Seventh and Ninth Circuits. The First Circuit has not explicitly decided whether a section 704(a) plaintiff must "demonstrate that he harbored a 'reasonable belief' of discriminatory employer behavior" or whether the plaintiff must show that he harbored a " 'conscientiously held belief' of such misconduct." *Monteiro v. Poole Silver Co.*, 615 F.2d 4, 8, 22 FEP Cases 90 (1st Cir. 1980) (footnote omitted). The *Monteiro* court found that "[u]nder either standard — the employer's conduct being nondiscriminatory in fact — the plaintiff must show that his so-called opposition was in response to some *honestly held*, if mistaken, feeling that discriminatory practices existed." Id. (emphasis added) (Footnote omitted). Thus, according to that court, if a reasonable person might have believed that the employer was engaged in unlawful employment practices, but the plaintiff actually did not in good faith hold such a belief, then the plaintiff's opposition conduct is unprotected. Id. at 8 n.6. We need not decide here whether it is necessary to adopt a good faith requirement

court made no explicit finding that plaintiff's opposition was based upon a reasonable belief that McLemore's hiring and promotional policies violated Title VII, such a finding is implicit and is sufficiently supported by evidence in the record.[12] Thus, plaintiff established that he reasonably believed that defendant McLemore's discriminated against blacks in employment opportunities. Moreover, plaintiff showed that his boycott and picketing activities were in opposition to this unlawful employment practice. Defendant's failure to rehire the plaintiff was undoubtedly an adverse employment action. Finally, there was evidence to support an inference that defendant's failure to rehire plaintiff was causally related to plaintiff's boycott and picketing activities.[13] Thus, plaintiff successfully established a prima facie case, thereby raising an inference of unlawful discrimination under section 704(a). The burden then shifted to the defendant to "rebut the presumption of discrimination by producing evidence" of a legitimate, nondiscriminatory reason for its failure to rehire plaintiff. *Burdine,* 101 S.Ct. at 1094.

[6] Defendant McLemore's steadfastly maintained at

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in addition to the reasonable belief requirement since, in the case before this Court, the plaintiff believed — reasonably and in good faith — that McLemore's was engaged in unlawful employment practices, and plaintiff's opposition conduct was in response to this belief.

12. The earlier quoted testimony of the plaintiff and of Russell Brass supports the conclusion that the plaintiff believed that the defendant was engaged in unlawful employment practices by virtue of McLemore's failure to hire blacks in or promote blacks to certain employment positions, and that this belief of the plaintiff was a reasonable one.

13. An inference that defendant's failure to rehire the plaintiff was caused by plaintiff's participation in the boycott and picketing activity was proper in view of the existence of evidence that the employer was aware of the plaintiff's activities and that, within a relatively short time after those activities took place, the adverse employment consequence occurred. The defendant was then entitled to an opportunity to introduce evidence to rebut this inference.

trial that the *only* reason plaintiff was not rehired was because he failed to reapply for a position with defendant. This comprised the full and complete extent of the rebuttal evidence presented by the agents of the defendant in an effort to articulate a legitimate, nondiscriminatory reason for the failure to rehire the plaintiff. Mr. Albert Hill, former manager of the fertilizer plant owned by McLemore's in 1970, testified on cross-examination as follows:

> Q. Isn't it true that your position is that the only reason that [plaintiff] was not rehired is that he never reapplied for a job; is that correct?
>
> A. That's correct.
>
> Q. You were the person in charge of hiring and firing; is that correct?
>
> A. That is correct.
>
> * * *
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> Q. It is your position, is it not, sir, that [plaintiff] never reapplied for the job?
>
> A. He did not reapply for the job. He did not reapply for the job the next spring.
>
> Q. He did not apply at any time during the spring of 1971?
>
> A. I don't believe so.

1st Supp. Record at 127-28. Similarly, at his deposition

Albert Hill testified as Follows:

Q. Why didn't Charles Payne get rehired when your — when your work stoppage was over — when your — your lay off was over?

A. He didn't come back and ask for his job.

Q. That's the only reason?

A. The only reason.

Record, vol. 1, at 267.

The Supreme Court has explained and clarified the nature of the rebuttal burden that shifts to the defendant as follows:

> The defendant need not persuade the court that it was actually motivated by the proffered reasons . . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant.

Burdine, 101 S.Ct. at 1094 (footnotes omitted). Here, the defendant McLemore's did "clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection." The single, exclusive reason relied upon by the defendant was that the plaintiff was not rehired because he failed to reapply for his position with the defendant. This reason — the failure to reapply — would, if believed, be legally sufficient to justify a

judgment for the defendant. Thus, the defendant carried its rebuttal burden at trial.

[7] After the defendant has an opportunity to rebut plaintiff's prima facie case, the plaintiff has a corresponding opportunity to show that the defendant's proffered explanation was in fact pretextual. Here, plaintiff presented substantial evidence that he did reapply for a job with McLemore's. The trial court found "as a fact that Mr. Payne did reapply for his position with the defendant corporation." Record, vol.2, at 313. There is, therefore, substantial evidence in the record to support the district court's conclusion that the defendant's explanation for its failure to rehire the plaintiff was merely pretextual. The district court further found that members of McLemore's knew of plaintiff's participation in the boycott and picketing, and that there was a casual relationship between defendant's failure to rehire plaintiff and plaintiff's participation in the protest activity. There is also substantial evidence in the record to support the district court's conclusion in this regard. Thus, on the facts and arguments presented to the trial court, that court correctly held that the defendant's failure to rehire the plaintiff violated section 704(a); that is, that the defendant's stated reason for not rehiring the plaintiff (the plaintiff's failure to reapply for a job) was merely pretextual and that the defendant's actual reason for not rehiring the plaintiff was the plaintiff's participation in activities in opposition to unlawful employment practices of the defendant.

Now on appeal, for the first time, defendant contends that even if plaintiff's activity was in opposition to unlawful employment practices of defendant, plaintiff's actions were not protected by section 704(a) because the *form* of plaintiff's opposition was not covered by the statute. It is well-established that not all activity in op-

position to unlawful employment practices is protected by section 704(a). *Hochstadt v. Worcester Foundation for Experimental Biology,* 545 F.2d 222, 229-34, 13 FEP Cases 804 (1st Cir. 1976). Certain conduct — for example, illegal acts of opposition or unreasonably hostile or aggressive conduct — may provide a legitimate, independent, and nondiscriminatory basis for an employee's discharge. Id. at 229. "There may arise instances where the employee's conduct in protest of an unlawful employment practice so interferes with the performance of his job that it renders him ineffective in the position for which he was employed. In such a case, his conduct, or form of opposition, is not covered by § 708(a)." *Rosser v. Laborers' International Union, Local 438,* 616 F.2d 221, 223, 22 FEP Cases 1274 (5th Cir.), cert. denied, 449 U.S. 886, 101 S.Ct. 241, 66 L.Ed.2d 112, 26 FEP Cases 1520 (1980). In order to determine when such a situation exists, the court must engage in a balancing test: "[T]he courts have required that the employee conduct he reasonable in light of the circumstances, and have held that 'the employer's right to run his business must be balanced against the rights of the employee to express his grievances and promote his own welfare.' " *Jefferies v. Harris County Community Action Association,* 615 F.2d 1025, 1036, 22 FEP Cases 974 (5th Cir. 1980) (quoting *Hochstadt,* 545 F.2d at 233).

It appears that a number of cases have assumed that it is part of defendant's rebuttal burden to show that the form of plaintiff's opposition was unprotected by the statute. See, e.g., *Rosser,* 616 F.2d at 223-24; *Jefferies,* 615 F.2d at 1035-37; *Hochstadt,* 545 F.2d at 229-34. If the defendant took an adverse employment action against the plaintiff because of opposition conduct by the plaintiff that was outside the protection of the statute, then the defendant may have had a legitimate, nondistriminatory reason to justify its actions. Thus, in

the case before this Court, if the *form* of plaintiff's activities placed them outside the protection of section 704(a), then the defendant may have had a legitimate, nondiscriminatory reason for its failure to rehire the plaintiff. However, if the form of plaintiff's activities was the nondiscriminatory reason for the defendant's failure to rehire the plaintiff, it was the defendant's responsibility to introduce evidence to that effect at trial. In *Rosser,* for example, plaintiff was a dues posting clerk with the defendant union, and her immediate supervisor was the union's secretary-treasurer. Ms. Rosser was nominated to run against her supervisor for the secretary-treasurer position at the request of some black union members who felt that the union discriminated against its black members. Although Ms. Rosser was subsequently disqualified from the race, she was discharged two days after her supervisor was re-elected. She brought a Title VII action, alleging that her candidacy was in opposition to practices made unlawful by Title VII, and that she was discharged in violation of section 704(a). The district court granted the union's motion for summary judgment on the ground "that the form of Mrs. Rosser's opposition, an attempted political ouster, was not protected by the statute and the union thus had a valid defense to her prima facie case" of discrimination. 616 F.2d at 223. The Fifth Circuit affirmed, finding that Ms. Rosser did make out a prima facie case of discrimination, but that "the union had a valid defense since the chosen form of her opposition, a political challenge, [was] not protected under Title VII." Id. at 224.

In *Gonzalez v. Bolger,* 486 F.Supp. 595, 22 FEP Cases 221 (D.D.C. 1980), the plaintiff, a former post office employee, brought an employment discrimination suit pursuant to section 704(a) alleging that he was discharged unlawfully in retaliation for his exercise of rights pro-

tected by Title VII. the district court made the following findings:

> At trial, plaintiff presented a *prima facie* case of retaliatory discrimination, by showing that he engaged in protected activities, that his employer was aware of the protected activities and that he was subsequently discharged, within a relatively short time interval after his performance of the activities. This series of events is sufficient to enable a court to infer retaliatory motivation, absent further explanation from the employer . . . .
>
> * * *
>
> In rebuttal, however, defendant presented substantial proof, through testimony and documentary exhibits, that plaintiff's insubordination and disruptive outbursts were in fact the cause for his termination. These reasons, if accepted on the proof as a whole, would constitute a valid non-discriminatory explanation for defendant's action.

Id. at 601-02. Since the court further found that plaintiff failed to establish that defendant's proffered justification was in fact pretextual, the court concluded that "[b]ecause plaintiff exceeded the limits of reasonable opposition activity on a continuing basis and his dismissal is attributable to these transgressions, the Court is forced to conclude that his termination was not pretextual, but rather was for valid non-discriminatory reasons." Id. at 601. The *Gonzalez* court clearly placed the burden on defendant to show as part of its rebuttal burden, that the "plaintiff's excessive conduct was the cause for his termination." Id. at 603.

Similarly, in *Hochstadt* the plaintiff claimed that her discharge violated section 704(a). The court in that case formulated the issue as whether plaintiff's hostile conduct "afforded an independent, nondiscriminatory basis for her discharge, or whether it was protected 'opposition' conduct under section 704(a)...." 545 F.2d at 229. This characterization of the issue indicates that the plaintiff's participation in activity unprotected by section 704(a) can provide the employer with a legitimate, nondiscriminatory reason for its employment actions. The *Hochstadt* court concluded that plaintiff's "serious acts of disloyalty, which damaged the employer's interests and were of an excessive nature which was not warranted as a response to any conduct of the [employer]" provided the employer with a legitimate, nondiscriminatory basis for discharging the plaintiff. Id. at 234.

[8] It therefore becomes apparent that in the instant case after plaintiff established his prima facie case, it was the responsibility of the defendant to show that the *form* of plaintiff's activities placed them outside the protection of section 704(a) and provided defendant with a legitimate reason for its failure to rehire the plaintiff. If the defendant intended to rely upon this contention, it was the defendant's responsibility to raise the issue at trial. Here, the defendant failed to offer *any* evidence at trial that its legitimate and nondiscriminatory reason for not rehiring the plaintiff was that plaintiff had engaged in hostile, unprotected activity that was detrimental to

the employer's interests.[14] With respect to the defendant's burden of rebutting plaintiff's prima facie case, the *Burdine* Court stated that: "An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel." 101 S.Ct. at 1094 n.9. If the defendant cannot meet its rebuttal burden by answer to the complaint or by argument of counsel at trial, the defendant undoubtedly cannot meet its rebuttal burden solely by argument of counsel for the first time *on appeal*. It is not permissible for this Court to relate the defendant's arguments on appeal back to the time of trial in order to determine whether defendant met its rebuttal burden at trial. Since the defendant failed to present *any* evidence at trial that the egregious and disruptive form of plaintiff's opposition constituted the legitimate reason for defendant's failure to rehire plaintiff, the defendant surely did not carry its rebuttal burden on this issue at trial.

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14. In addition, the defendant did not raise this issue in its pleadings. The only contention made by the defendant that the conduct of the plaintiff was not protected by section 704(a) was that the boycott and picketing were not in opposition to an unlawful employment practice of the defendant and so did not satisfy the requirements of section 704(a). Thus, the pre-trial order stated:

> In the alternative only, in the event that the Court finds that [plaintiff] was not recalled in early 1971 or that plaintiff was refused a position with defendant after plaintiff reapplied for a position with defendant in early 1971 because of plaintiff's militant activities, plaintiff must show that those militant activities were in opposition to any practice made an unlawful employment practice by Subchapter VI of Chapter 21 of 42 U.S.C.

Record, vol. 1, at 245. While defendant did allege that plaintiff's activity was not in opposition to an unlawful employment practice of McLemore's, defendant did not assert that the form of plaintiff's activity was outside the scope of section 704(a).

Defendant nevertheless urges that we consider this newly raised contention for the first time on appeal. "As a general principle of appellate review, this court will not consider a legal issue or theory that was not presented to the trial court .... '[J]udicial economy is served and prejudice is avoided by binding the parties to the facts presented and the theories argued below.' " *Bliss v. Equitable Life Assurance Society*, 620 F.2d 65, 70 (5th Cir. 1980) (quoting *Higginbotham v. Ford Motor Co.*, 540 F.2d 762, 768 n.10 (5th Cir. 1976)). This general rule of appellate review — that issues not raised in the trial court will not be considered for the first time on appeal — is not without its exceptions, however. Thus, "when a pure question of law is involved and a refusal to consider it would result in a miscarriage of justice," *Martinez v. Mathews*, 544 F.2d 1233, 1237 (5th Cir. 1976), the general rule will not bar a consideration of the new issue. *McCrary v. Poythress*, 638 F.2d 1308, 1314 n.6 (5th Cir. 1981); *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 658 n.47, 8 FEP Cases 433 (5th Cir. 1974); *Evans v. Triple R. Welding & Oil Field Maintenance Corp.*, 472 F.2d 713, 716 (5th Cir. 1973). See *Higginbotham*, 540 F.2d at 768 n.10 (The rule "does not apply if a manifest injustice would result from ignoring the new legal theory."). Some courts have stated that the consideration of a new issue for the first time on appeal requires the existence of "exceptional circumstances." *D. H. Overmyer Co. v. Loflin*, 440 F.2d 1213, 1215 (5th Cir.) ("In the absence of exceptional circumstances where a miscarriage of justice would result, a condition not present here, questions that were not presented to or passed on by the trial court will not be considered on appeal."), cert. denied, 404 U.S. 851, 92 S.Ct. 87, 30 L.Ed.2d 90 (1971). See *Triple R. Welding*, 472 F.2d at 716.

While an issue will generally be considered for the first

time on appeal when the issue is a purely legal one and the failure to consider it would result in a miscarriage of justice, "the rationale for the [general] rule *requires* its application if additional facts would have been developed in the trial court had the new theory been presented there . . . ." *Higginbotham*, 540 F.2d at 768 n.10 (emphasis added). When no further factual development is required and a miscarriage of justice would otherwise result, appellate courts in this Circuit have been willing to consider new issues for the first time on appeal. In *Triple R. Welding*, for example, the district court denied a claim for indemnity by *McDermott* (the pro hac vice barge owner) against *Triple R* (the employer of the injured employee). *McDermott* was based upon an *implied* warranty of workmanlike performance. The district court concluded that since there existed an *express* contract between *McDermott* and *Triple R* covering the warranty of workmanlike performance, *McDermott* could not rely on an *implied* warranty. On appeal, *McDermott* argued for the first time that it was entitled to indemnity under the contract. The Fifth Circuit stated:

> It is apparent that appellants have changed their legal theory. Had they asserted a request for judgment of indemnity based on the express provisions of the written contract, they would undoubtedly have prevailed in the District Court. All of the evidence pertaining to the case is in the record, including the contract between *McDermott* and *Triple R*, and there is no failure therefore to have adequate evidence before the Court. However, it is clear from the District Judge's findings of fact, which we approve, the *McDermott* is entitled to indemnity for breach of the warranty of workmanlike performance against *Triple R*, but under the express provi-

> sions of its contract and not under a theory of implied warranty.

472 F.2d at 716. Since no further findings of fact were required to resolve this issue, and since the court of appeals concluded that a miscarriage of justice would occur if the Court failed to consider *McDermott's* right to indemnity under the contract, the Court allowed *McDermott* to raise this argument for the first time on appeal. Similarly, the Court in *T. J. Stevenson & Co. v. 81,193 Bags of Flour,* 629 F.2d 338 (5th Cir. 1980), allowed one of the parties to raise a new issue for the first time on appeal "because the issue is entirely a legal question and does not require the development of additional facts." Id. at 375.

The new issue that McLemore's wishes this Court to consider for the first time on appeal — whether the form of plaintiff's activities provided McLemore's with a legitimate, nondiscriminatory reason for its failure to rehire plaintiff — is not a pure question of law that would not require the development of additional facts. To find that opposition conduct is outside the protection of section 704(a), the court must engage in a balancing of the interests of the employer and the employee, Courts have required that the employee's conduct be reasonable in light of the circumstances and that the conduct not be *unjustifiably* detrimental to the employer's interests. When the defendant offers evidence that plaintiff's conduct was outside the protection of section 704(a), and therefore provided the defendant with a nondiscriminatory reason for its employment action, the plaintiff is entitled to an opportunity to show that his activities were reasonable under the circumstances and were warranted by the employer's conduct. This Court is not prepared to hold as a matter of law that participation in boycotting and peaceful picketing by a former

employee who is not employed by the defendant at the time of his opposition conduct is outside the protection of section 704(a). At least where conduct is not unprotected as a matter of law, the fact finder must have an opportunity to hear evidence, to balance the competing considerations, and to reach a conclusion as to the reasonableness of the conduct. Here, defendant's failure to raise this argument at trial precluded the plaintiff from presenting any evidence that, under the circumstances, plaintiff's organization of a boycott and participation in a peaceful picket was neither unreasonable nor unprotected. This, further factual development would be essential for a proper resolution of this issue.

In addition, we cannot say that a miscarriage of justice would result from a failure to consider this issue for the first time on appeal. First, it is not at all certain that McLemore's would have prevailed on this ground had it raised this issue below. Plaintiff's activity is not clearly unprotected activity since, at the time of the boycott and picketing plaintiff was not actively working for McLemore's and thus had little opportunity for direct access to McLemore's in order to air his grievances.[15] Second, it was the defendant's responsibility to narrow the issues at trial. The defendant's reliance at trial exclusively upon a single argument to explain its failure to rehire the plaintiff — that plaintiff did not reapply for a job — served as a limitation upon the plaintiff's response. The contention made by the defendant dictated that plaintiff respond to *that* allegation by

15. This Court, however, expresses no opinion as to whether plaintiff's opposition conduct would have been — or should have been — found by the trial court to be protected activity if the defendant had raised at trial the argument that the form of the opposition was unprotected by the statute.

showing that *that* allegation was pretextual. The *Burdine* Court noted that one reason for placing a rebuttal burden upon the defendant was to enable the parties to narrow the issues during the progression of the trial. The *Burdine* Court stated:

> If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

101 S.Ct. at 1094-95 (footnote omitted). Thus, when the defendant relied at trial solely upon the contention that plaintiff was not rehired because he did not reapply for a job, the defendant narrowed the factual inquiry to this issue alone. It became plaintiff's responsibility to show that this reason -- the only reason offered by the defendant for the failure to rehire the plaintiff -- was pretextual. Plaintiff was not required -- indeed, would not have been permitted -- to respond to an issue that defendant had never raised, either in its pleadings or in evidence introduced at trial. Where it is incumbent upon the defendant to narrow the issues, the defendant should not be entitled to raise new issues on appeal simply because those he relied upon at trial were unsuccessful. This is precisely the kind of situation where "judicial economy is served and prejudice is avoided by binding the parties to the facts presented and the theories argued below." *Higginbotham*, 540 F.2d at 768 n.10.

The Supreme Court has recognized that:

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases . . . . Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt . . . or where "injustice might otherwise result."

Singleton v. Wulff, 428 U.S. 106, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976). We do not have such a case before us here.[16] In fact, the Supreme Court's conclusion in *Singleton* — that injustice would more likely be *caused* then avoided by deciding the issue without one party having had an opportunity to be heard — is equally applicable here.

While a finding of discrimination is an ultimate fact subject to plenary review, we are bound to the subsidiary facts as found by the district court unless they are clearly erroneous. See *Thompson v. Leland Police Department*, 633 F.2d 1111, 1112, 26 FEP Cases 738 (5th Cir. 1980). Here, the district court's findings of subsidiary fact are not clearly erroneous, and there are sufficient subsidiary facts to support the ultimate finding

16. The Supreme Court's enumeration of particular circumstances in which an appellate court might be justified in considering an issue for the first time on appeal was not intended to be an exclusive list. 96 S.Ct. at 2877 n.8. In the case at bar, however, there exists neither the circumstances specifically mentioned by the Supreme Court, nor any additional circumstances that would require us to exercise our discretion and to consider the defendant's new theory at this juncture. Consequently, we refuse to do so.

that McLemore's failure to rehire plaintiff constituted discriminatory action under section 704(a). Since plaintiff made out his prima facie case of discrimination under section 704(a), and since the only explanation offered by the defendant for its failure to rehire plaintiff was correctly determined to be pretextual, the judgment of the district court for plaintiff is

AFFIRMED.

DISSENTING OPINION

COLEMAN, Circuit Judge, dissenting: — I have long recognized that dissenting opinions are generally useless and, for that reason, have not always filed a dissent when disagreeing with a majority opinion or some part of it. Here, I choose to record my disagreement with the views of my distinguished Brethren of the majority.

The gravamen of my concern is found in the concession of the majority opinion slip.op. p. 11053, p.____, 26 FEP Cases p. 1504, that "The Fifth Circuit has not heretofore directly addressed the issue whether proof of an actual unlawful employment practice is necessary under the opposition clause, or whether an employee is protected from retaliation under the opposition clause if the employee reasonably believes that the employer is engaged in unlawful employment practices".

The majority then proceeds to hold that reasonable belief is enough.

However, the statute, 2000e—3(a), stripped of its inapplicable verbiage, reads:

> It shall be an unlawful practice for an employer to discriminate against . . . because he has opposed any practice made an unlawful employment practice by this subchapter.

The statute speaks in terms of practices — not what someone "reasonably believes" to have been a practice when, in fact, the practice did not exist. I cannot believe that Congress intended (since it did not say so) to penalize employers for what an employee or applicant "believes" when, in fact, the employer is innocent. To hold otherwise is to deprive employers of their property rights in violation of the due process clause.

Finally, I dissent because, as the majority concedes on slip.op. pages 11055-11056, page, 26 FEP Cases p. 1506, the District Court made no finding [the majority adds the word "explicit"] that the plaintiff's opposition was based upon "reasonable belief". In proceeding to make its own, inferential, findings of fact the majority cites not a single specific fact that would support a finding of reasonable belief.

In the finish, I do not wish to be cast in the role of even appearing to approve boycotts against a whole community, the innocent and the guilty alike, as the kind of activity which Congress intended to protect by this statute.

I respectfully dissent.

B-1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT A

NO. 79-3674

CHARLES PAYNE,
Plaintiff-Appellee

versus

McLEMORE'S WHOLESALE & RETAIL STORES,
A Louisiana Corporation,
Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Louisiana

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion September 4, 1981, 5th Cir., 1981, ____f.2d__).
(OCTOBER 16, 1981)

Before COLEMAN, GARZA and SAM D. JOHNSON,
Circuit Judges.

PER CURIAM:

(✓) The petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

SAM D. JOHNSON
UNITED STATES CIRCUIT JUDGE

C-1

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

CIVIL ACTION NO. 76-0635

CHARLES PAYNE

versus

McLEMORE'S WHOLESALE & RETAIL STORES

JUDGMENT

This action came on for trial before the court, Honorable Tom Stagg, District Judge, presiding, and the issues having been duly tried, and a decision having been duly rendered, for the reasons set forth in this court's Findings of Fact and Conclusions of Law which were orally assigned in Open Court,

IT IS ORDERED AND ADJUDGED that the plaintiff, Charles Payne, recover of the defendant, McLemore's Wholesale & Retail Stores, the following amounts:

Backpay in the amount of $8,244.22	
at 7% interest for 21 months	$9,975.51
Costs	297.89
Attorneys fees	5,987.50
TOTAL	$16,260.90

These figures are based upon computations jointly submitted by the parties.

THUS DONE AND SIGNED in chambers at Shreveport, Louisiana, this 25th day of September, 1979.

TOM STAGG
UNITED STATES DISTRICT JUDGE

FINDINGS OF FACT and CONCLUSIONS OF LAW

This will be the Court's findings of fact and conclusions of law. I will as usual reserve the right to place these in more formal language in the event that either party decides or desires to appeal this Court's ruling.

This litigation grew out of an alleged and unlawful practice by the defendant McLemore Wholesale and Retail Stores. The plaintiff, Charles Payne, filed this lawsuit pursuant to Title VII of the Civil Rights Act. In his complaint, he alleged that the defendant refused to rehire him after a seasonal reduction in the defendant's work force because of the plaintiff's civil rights activities.

In his pleadings, Mr. Payne seeks both reinstatement and back pay. The defendant corporation has denied any wrong doing with respect to the employment or non-employment of Charles Payne. Bearing in mind the primary purpose of Title VII is to assure equality of employment opportunities and to eliminate those discriminatory practices and the vices which McDonald-Douglas uses its six-bit words when other words would suffice. It uses the terms fostered racially, etcetera. This simply means that they are unkind in their employment duties toward minority persons.

This Court must use its equitable powers to rectify any wrong found pursuant to the strictures of Title VII. It is elementary to find in this case that the plaintiff is a black male citizen of the United States and that the defendant is a corporation domiciled in Winnsboro, Louisiana.

At the time in question, the fall of 1970 and the spring

of 1971, the corporation's employment force was in the neighborhood of three hundred people, places it within the category for industry effecting commerce. And, therefore, it was effected by the rules of Title VII.

The plaintiff worked in the defendant's fertilizer plant in Winnsboro as a plant operator. Also, he worked in other facets of the McLemore company's various enterprises, and this was until he was laid off in November of 1970. At or about the time of the layoff, the evidence is clear that the plaintiff and along with others became involved in the organization known as the Franklin Parish Improvement Association. This was a group of black citizens organized to improve their living and working conditions within the parish. It further being shown by the evidence that this organization organized a boycott against merchants in Winnsboro, which boycotting included the establishments owned and operated by the defendant corporation. From the evidence presented, the boycott was effective. Mr. Payne's active involvement in the boycott became known to his direct supervissor, and including Mr. Albert Hill, who was in charge of hiring and firing the personnel at the fertilizer plant.

After the layoff in the spring of 1971, or early 1972, in January or February of 1972, the defendant began rehiring and placing its employees into the fertilizer plant and to prepare for the spring crop season, but the plaintiff was not one of those persons who was recalled or rehired. The record indicates that Mr. Payne had worked for the McLemore organization since 1966. And on these previous years, he was laid off only once before, and according to his testimony and it was undisputed, he was laid off twice. This was one time early in his employment with the McLemore organization, early in November of 1970 and in his terminology, he worked the year 'round. If he got out of work in the fertilizer plant, they sent him

to bottling plant or to some other part of the McLemore operations. In this year, he was neither sent for nor was he hired when he requested his job back.

This court finds as a fact that Mr. Payne did reapply for his position with the defendant corporation. It is very believable to me that a man's mama would say to him, and this would be under the circumstances related by the plaintiff that he and his wife and children were living on somebody else's paycheck, and he would get strong maternal suggestions to get out of the house and go get your job back. That statement has the ring of truth. Since he had been repeatedly employed by the defendant for the previous four years, I do find that as to the fact that he did ask for his job back and that he did not get his job back. The facts show that also other blacks especially those who had not actively participated in the boycott were rehired in the spring of 1971. The record indicates that Mr. Payne filed an EEOC charge against the McLemore organization in February of 1971. For some reason, the judges are unable to conclude that a right to sue letter did not occur until March 23, 1976. That is a full five years and one month later. There is an indication in the file that a letter was written by the EEOC both to Mr. Payne and to Mr. McLemore, the McLemore companies under the date of February 28, 1974, inviting an attempt to conciliate, to consider conciliation of the dispute. I might add that there is a binding also of the fact that there are no existing employment records of the period under question. Although before the five years that Mr. Hill contended that he kept his records because of the IRS requirements, it is interesting that within the five years in question he had a visit from an EEOC interviewer. At least by then he knew the charges were pending and were being followed up on. Which would have or should have raised in his mind the question whether he would or

would not preserve the employment records of the complaining party. Based on those findings of fact and conclusions of law, formal conclusions of law, they are clear. This Court has jurisdiction, venue is proper, and the plaintiff having received a right to sue letter, has met all of the jurisdictional requirements of Title VII. Under that law, the defendant corporation is the employer as described in Section 701B. The plaintiff is a person within pruview of Section 701.

In refusing to rehire Mr. Payne, because of his civil rights activities, the defendant was in violation of Section 704A, which in part provides that it shall be an unlawful employment practice for an employer to discriminate against any of his employees, or applicants for employment because he has proposed any practice made unlawful by this title, or because he made a charge, testified, assisted, participated, in a manner in an investigation under this title. The Supreme Court has approved that language and the affect of it in the principle case of *McDonald-Douglas versus Green.* This Court holds that the civil rights activities that was engaged in was a protected activity described in Section 704A of Title VII; and that as a matter of law, this Court finds that he was not rehired because of his involvement in the protected activity of picketing and boycott and the like.

The Fifth Circuit in *Pettway* and many other Court decisions have affirmed that the answer by this Court is almost foreordained based on the findings. Accordingly, the defendant's failure to rehire the plaintiff premised upon his civil rights activity is a violation of Section 704A of Title VII, which the plaintiff is entitled to relief.

Now the remedies are set out in 706 of the Act. The Court may order such affirmative actions as may be ap-

propriate, may include reinstatement or rehiring, or the hiring of employees with or without back pay, or any other equitable relief as the Court may deem appropriate.

In the *Alamar Paper* case, the Court held that the back pay should be afforded the prevailing plaintiff absent compelling circumstances. I find no such circumstances here. This is as a part of the make whole relief grounded in this Court's equitable power in a Title VII action.

The Court finds that back pay should be awarded in this case and starting from the date of the discriminatory act which I will fix as February 1, 1971. Under all of the testimony by that date the fertilizer plant should have been going back into production for the 1971 season. Under normal circumstances the crew would have been hired by then. There are no records present by which that could be judged but there are layoff records that would show that the layoff that year occurred in the manner described by Mr. Hill, this was either May or June of that year. And that back pay will extend from February 1971 until 1979. This will be with the exception of the years that the defendant company would have paid less to the plaintiff than the plaintiff earned from other sources. I read in the pleadings submitted by the plaintiff in the Title "calculation of damages" that the last year in which the earnings were apparently less than the earnings available if he had continued in his employment at the McLemore company, would have been in 1975. And that beginning in 1976 his outside earnings were in excess of those which would have been earned at McLemores. So the back pay obligation has to be calculated beginning in February of 1971 and extending through December 1975 unless counsel for both parties can agree on other or different dates.

In the *Alamar Paper* decision, the Supreme Court stated that the legislative history makes it clear that the Title VII back pay provisions are modeled on the back pay provisions of the National Labor Relations Act. Accordingly, this Court in its discretion can determine whether the unemployment compensation payments should be deducted from the back pay award.

In keeping with my feeling that this is a make whole law, any revenue gained by the plaintiff after his failure to be rehired is to be considered in concluding what the back pay award would be. It is a make whole law and not a bonus provision in this Court's opinion. So in making the calculations where there was unemployment compensation, and if it can be determined with any specificity at all, it will be available as a deduction in the calculation of back pay. And in keeping with the National Labor Relations Act provisions, the back pay shall be calculated on a yearly basis. In other words, there will be calculations for the year of 1971 on its own bottom, the year of 1972, 1973, 1974 and 1975. Those years will be figured individually. And in any years where the record indicates the plaintiff had a better paying job, then no back pay will accrue for those years. As I mentioned earlier, that one exhibit by the plaintiff which I used as illustration showed that no back pay would be owed for 1976, 1977, 1978, or 1979.

In addition, the *Pettway* case requires that I award interest on the back pay annually from the date of this suit until paid. That will be at the rate of 7%.

Mr. Payne is also entitled to an award of costs and of reasonable attorneys fees. I order that the counsel for the plaintiff will submit a copy of his time records showing the amount of time that he has spent on this lawsuit,

not that of Mr. Halpin or other counsel. This is just Mr. Kellogg's time that is awarded and no one else. Those will be furnished to the Court as described in *Johnson versus Georgia Highway Express.*

The judgment affixing the amount of the back pay will result from both counsel filing with this Court their appreciation of the earnings of the plaintiff in other employments. And the hypothetical earnings that he would have obtained had he remained at McLemores. Because the evidence is completely one way from the plaintiff and the other way from the defendant, there cannot be an easy way for the Court to determine what was the preponderance of the evidence. Using the evidence given that for three months out of the year, everybody at the fertilizer plant worked like hell to get the stuff out, it would be fair considering the specificities of the weather, some long days, and some days at home on the porch that if an average of, and I will admit that this will be high, but if I error it will be on the high rather than on the low side, if there was an average during those three bad months of 75 hours and considering there being four weeks to a work month and three months, then we are talking about 900 hours for those three months where there was overtime compensation to be paid or would have been paid. And there are nine months in which work occurred at a regular rate for Mr. Payne at no more than forty hours per week, which would in nine months produce 1440 hours. Now on the average and there being a total of 2340 hours for twelve months and dividing that by twelve months, and we have 195 hours per month, then divide that by four weeks, then that comes out to be 49 hours per week. If you divided 2340 hours by 52 weeks in the year, or 50 weeks in a year, because I am sure — I am not sure that they paid vacations at LcLemores. Because of the layoffs, I doubt there were vacations. This comes out to be either 45 hours per

week or 50 hours per week. This leaves some room for negotiations by counsel.

I want counsel to submit to each other their proposed back pay numbers. Also an attempt to resolve the matter without further imposition of this Court. I have almost 400 pending civil matters and that is not counting the criminal docket. I haven't the luxury of the time that it takes to have any further hearings on this subject. If you cannot decide what those numbers are, then I will decide it. I would prefer that counsel do it.

Reinstatement is not to be ordered. It is not a part of the relief ordered by this Court in this case. It being the felt consideration of this Court, the plaintiff who is making $17,000.00 a year in Houston, Texas, and has six children and a wife to support, ought to stay where the money is. The evidence doesn't show that there are jobs available in Winnsboro within the McLemore organization where reinstatement would earn him a living wage in order for he and his family to live in Franklin Parish. I decline so to order.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-3674

CHARLES PAYNE

versus

McLEMORE'S WHOLESALE

October 30, 1981

Mr. G. Phillip Shuler
Attorney at Law
1500 First NBC Building
New Orleans, LA 70112

MANDATE STAYED TO AND INCLUDING
NOVEMBER 23, 1981

the court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the staya there is filed with the Clerk of this Court a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that Court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, F.R.A.P.

Under revised Rule 19.1 of the Supreme Court, effective June 30, 1980, a request to certify the record prior to

action by the Supreme Court on the petition for certiorari should *not* be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by that Court.

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

GILBERT F. GANUCHEAU
Clerk of Court

BY: JOAN PERKINS
Deputy Clerk

F-1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CIVIL ACTION

NO. 76-0635

SECTION "B"

CHARLES PAYNE,

Plaintiff

versus

McLEMORE'S WHOLESALE & RETAIL STORES,

Defendant

SECOND AMENDED PRETRIAL STIPULATION

A conference of attorneys in the above-entitled case was held on the 26th day of September, 1978. This pretrial stipulation shall bind the parties.

R. JAMES KELLOGG appeared as counsel for plaintiff

E. FRANK SNELLINGS appeared as counsel for defendant

1. There are no jurisdictional questions. Jurisdiction is vested pursuant to 42 U.S.C. 2000e—5(f) and 28 U.S.C. 1343.

2. There are no pending motions.

3. In general the plaintiff claims that he worked for defendant beginning in May or June of 1966 as a worker in defendant's fertilizer plant. In the years prior to 1970, plaintiff was transferred to another of defendant's divisions when work in the fertilizer plant slackened. In November 1970, plaintiff was laid off, but was informed he would be called back to work when business picked up.

In December 1970, plaintiff engaged in a peaceful civil rights boycott of several stores, including McLemore's Jitney Jungle Food Stores. The manager of the plant was aware of plaintiff's civil rights activity. Plaintiff was not recalled to his former position when business increased in early 1971. Defendant's failure to recall plaintiff was without just cause and was on account of plaintiff's race and civil rights activity.

Plaintiff filed a timely charge of discrimination with the Equal Employment Opportunity Commission and exhausted administrative remedies.

4. In general the defendant claims that it occasionally employed plaintiff from time to time, but that plaintiff never reapplied for a position with defendant after he was laid off by virtue of the seasonal nature of his employment in the fall of 1970.

5. The following facts are established by the pleadings and by stipulations or admissions of counsel.

a. This court has jurisdiction of the case. All statutory prerequisites to this action have been complied with by plaintiff. Venue is proper.

b. Plaintiff was periodically employed by defendant from 1964 to 1965 until 1970.

c. Plaintiff was laid off from his employment with defendant in the fall of 1970 because of a decrease in business.

d. Plaintiff is a Black citizen of the United States, currently residing in Texas.

e. Defendant is a Louisiana corporation engaged in a business affecting commerce and is an employer within the meaning of 42 U.S.C. 2000e.

6. The contested issues of fact are:

a. Whether or not plaintiff was told when he was laid off in November 1970, that he would be called back to work when business picked up.

b. Whether or not plaintiff engaged in civil rights activity in December, 1970.

c. Whether or not agents and/or employees of defendant were aware of those civil rights activities.

d. Whether or not plaintiff was threatened with bodily harm if he returned to the defendant's premises.

e. Whether or not plaintiff was not recalled in early 1971 because of his race and his civil rights activity.

f. Whether or not plaintiff reapplied for a position with defendant in early 1971.

g. The amount of backpay and other compensation which should be awarded, if any.

h. Whether or not plaintiff has suffered any injury because of any act or failure to act by defendant.

7. The contested issue of law is whether defendant discriminated against plaintiff on the basis of his race and civil rights activity within the meaning of 42 U.S.C. 2000e *et seq.*

8. The following exhibits were marked and will be offered in evidence:

A. Plaintiff's Exhibits —

1. EEOC Charge No. TNO 1-0784 and the file relating to that charge.

2. Plaintiff's First Interrogatories and Defendant's Responses thereto.

B. Defendant's Exhibits: Defendant's First Interrogatories and Plaintiff's Responses thereto.

Except as otherwise indicated, the authenticity of these exhibits is stipulated but they have been received subject to objections by the opposing party, if any, at the trial, to their relevancy and materiality. If other exhibits are to be offered and their necessity can be reasonably anticipated, they will be submitted to opposing counsel at least *ten days* prior to trial.

9. The following witnesses may be called:

(a) Plaintiff's witnesses

1. Charles Payne, the plaintiff, will testify as to the facts underlying the complaint.

2. George Washington, Richard Hoard and/or Russell Brass may be called to testify as to similar matters.

3. Albert Hill may be called to testify as to the operation of the company, the reasons for the layoff of plaintiff, threats against plaintiff and similar matters.

4. Mr. James McLemore may be called to testify as to similar matters.

(b) Defendant's witnesses:

1. Charles Payne, the plaintiff, will be called on cross examination to testify as to the determination of damages, if any.

2. Mr. Albert Hill may be called to testify as to the allegations contained in plaintiff's petition.

3. James McLemore may be called to testify as to similar matters.

4. Russell Brass may be called to testify as to similar matters.

5. Richard Hoard may be called to testify as to similar matters.

6. George Washington may be called to testify as to similar matters.

7. Lee Al McDowell may be called to testify as to similar matters.

8. I. Q. Robertson may be called to testify as to similar matters.

10. There are no amendments to the pleadings except to change the name of the defendant to "McLemore Wholesale and Retail Stores, Inc." in paragraph three of the complaint, a non-substantive amendment. This amendment is hereby agreed to by the parties.

11. The probable length of the trial of this case is one day.

APPROVED AS TO FORM AND SUBSTANCE:

R. JAMES KELLOGG
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806 perdido St., Suite 401
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(504) 566-0336

BY: R. JAMES KELLOGG
ATTORNEY for Plaintiff

E. FRANK SNELLINGS
SNELLINGS, BREARD, SARTOR
INABNETT AND TRASCHER
Post Office Box 6134
Monroe, LA 71203

BY: E. FRANK SNELLINGS
ATTORNEY for Defendants

SHREVEPORT, LOUISIANA, this _____ day of September, 1978.

SENIOR UNITED STATES JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CIVIL ACTION
NO. CI 760635
SECTION

CHARLES PAYNE,
Plaintiff,

vs.

McLEMORE'S WHOLESALE & RETAIL STORES,
Defendant.

COMPLAINT

I. JURISDICTION

1. This is an action to redress violations by defendant of the rights of plaintiff secured by the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. 1981. This Court has jurisdiction pursuant to 706(f) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f) and by 28 U.S.C. 1343. Plaintiff seeks a declaratory judgment pursuant to 28 U.S.C. 2201 *et seq.*, injunctive relief and back pay.

II. PARTIES

2. Plaintiff, Charles Payne, is a black citizen of the United States and the State of Texas. He resides at 5637 Yale Street, Houston, Texas.

3. Defendant, McLemore's Wholesale and Retail Stores, is a Louisiana corporation engaged in business affecting commerce. The Defendant is an employer within the meaning of 42 U.S.C. 2000e-2(a)(1)(2).

III. STATEMENT OF FACTS

4. Plaintiff Charles Payne, began his employment with Defendant in 1964 or 1965, as a worker in the fertilizer plant. Employment in some of defendant's operations is of a seasonal nature. In years prior to 1970, whenever business slackened in the fertilizer plan, plaintiff had been transferred to another of defendant's divisions, such as the warehouse and the food store.

5. In November 1970, plaintiff was laid-off, along with several other employees. He was informed by the Plant Manager that he would be called back to work business picked up again.

6. In December 1970, the plaintiff and others organized the Franklin Parish Improvement Organization. This group engaged in the peaceful boycotting of Winnsboro stores, among them McLemore's Jitney Jungle Food Stores, which had refused to employ blacks except in a few menial positions. The manager of the fertilizer plant was aware of plaintiff's civil rights activity.

7. Because of his civil rights activity, plaintiff was threatened with bodily harm if he returned to the defendant's premises.

8. In early 1971, business increased at the fertilizer plant and the positions from which the plaintiff and others had been laid-off were filled. The plaintiff was not recalled to his former position. Defendant's failure to

recall plaintiff was without just cause and on account of plaintiff's race and his civil rights activity.

9. In February 1971, plaintiff filed a charge of discrimination against defendant with the U.S. Equal Employment Opportunity Commission.

10. The EEOC issued a determination that plaintiff had in fact been discriminated against on account of his race in regard to the threats and the failure to recall.

IV. EXHAUSTION

11. Plaintiff filed a charge of discrimination against McLemore's Wholesale and Retail Stores, with the U.S. Equal Employment Opportunity Commission within the time period for such complaints (charge no. TNO 1 0784). The EEOC issued a right-to-sue notice, pursuant to 42 U.S.C. 2000e-5(f)(1) for this charge on March 23, 1976.

12. Neither the State of Louisiana nor the City of Winnsboro, nor any other political subdivision involved herein has any law prohibiting discrimination in employment on the basis of race.

V. VIOLATIONS OF LAW

13. The acts and conduct of defendant in refusing or failing to recall the plaintiff, and in threatening the plaintiff, constituted a policy and practice which adversely affected the employment opportunities of plaintiff on account of his race, in violation of 42 U.S.C. 2000e and 42 U.S.C. 1981.

VI. EQUITY

14. There is a real and actual controversy between

the parties, as alleged herein. Plaintiff is without an adequate remedy at law. Plaintiff has suffered and will continue to suffer irreparable injury until the discriminatory practices engaged in by defendant are enjoined and redressed.

VII. DEMAND FOR JUDGMENT

WHEREFORE, Plaintiff respectfully prays that this Court:

a) permanently enjoin defendant from engaging in acts and practices which discriminate against a plaintiff and other black employees;

b) grant to plaintiff such compensatory relief, including reinstatement and back pay, as will redress the discrimination against him;

c) award the plaintiff the costs of this action, including reasonable attorney's fees, pursuant to 42 U.S.C. 2000e-5(1); and

d) grant such other and further relief as may be just and proper.

Respectfully submitted;

SUSAN H. CAMPOS
STANLEY A. HALPIN, JR.
Attorney for Plaintiff
344 Camp Street, Suite 1212
New Orleans, LA 70130
(504) 581-2688

BY: SUSAN H. CAMPOS

DATED: June 16, 1976

PLEASE SERVE:

J. W. McLemore, Jr.
401 Mary Marr
Winnsboro, LA 71295

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

This is to certify that the above and foregoing contained on this and preceeding 2 pages is a true and correct copy of the original.

June 17, 1976
ROBERT H. SHEMWELL, Clerk

BY: WILLIAM P. GATES
Deputy Clerk

Opposition

NO. 81-986

Office - Supreme Court, U.S.
FILED
FEB 16 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

McLEMORE'S WHOLESALE &
RETAIL STORES, INC.,

Petitioner

VERSUS

CHARLES PAYNE,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

R. JAMES KELLOGG
631 St. Charles Avenue
New Orleans, Louisiana 70130
(504) 524 - 0016

ATTORNEY FOR RESPONDENT
CHARLES PAYNE

QUESTIONS PRESENTED

(a) Whether the evidence was sufficiently substantial to support the concurrent findings of the two lower courts that the purpose of the boycott and picketing activities in which respondent participated was to oppose petitioner's unlawful employment practices.

(b) Whether the evidence was sufficiently substantial to support the concurrent findings of the two lower courts that petitioner's explanation for its failure to rehire plaintiff was merely pretextual and thus to find violation of the Title VII opposition clause.

(c) Whether the petitioner can rely upon its contention raised for the first time on appeal that the form of respondent's activities placed them outside the protection of the Title VII opposition clause and provided the petitioner with a legitimate reason for failure to relieve respondent.

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No. 81-986

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

McLEMORE'S WHOLESALE & RETAIL STORES, INC.,

Petitioner

VS.

CHARLES PAYNE,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals in this matter is reported as *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130 (CA-5, 1981). It is set forth Appendix "A" in the Addendum to Petition for Writ of Certiorari previously filed in this matter. ("Addendum")

The order of the Fifth Circuit Court of Appeals denying rehearing and rehearing *en banc* is unreported and is set forth as Appendix "B" in the Addendum.

The judgment of the United States District Court for

the Western District of Louisiana upholding plaintiff's claim is unreported and is set forth at Appendix "C" in the Addendum. The district court's reasons for judgment are unreported and are set forth at Appendix "D" in the Addendum.

JURISDICTION

Jurisdiction of this Court is vested by 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 704(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e–3(a) is involved in this case and is set forth in full in the Petition for a Writ of Certiorari previously filed in this matter.

STATEMENT OF THE CASE

A. Statement of Facts

The panel opinion of the Court of Appeals for the Fifth Circuit clearly summarizes the finding of facts by the trial court. 654 F.2d 1130 at 1134–35, Add., p. A-5 to A-7.*

B. Course of Proceeding and Disposition of the Case.

In February, 1971, respondent filed a charge of discrimnation against petitioner with the Equal Employment Opportunity Commission (EEOC). The EEOC issued a right to sue letter on March 23, 1976. On June, 17, 1976 respondent filed this action in federal district court.

Trial was held in district court on July 17, 1978. The district court issued oral findings of fact and conclusions of law upon the completion of trial. The district court found that plaintiff had established a prima facie case of discrimination under section 704(a) of the Civil Rights Act of 1964, 42 USC §2000e–3(a), by showing that the petitioner's failure to rehire respondent was caused by respondent's participation in boycott and picketing activities in opposition to an unlawful employment practice of the petitioner. In addition the district court found that respondent proved that the employer's proffered explanation for its failure to relieve respondent - - that respondent failed to reapply for a job with the employer - - was merely pretextua

The Fifth Circuit Court of Appeals affirmed the judgment of the district court "because the finding of retaliatory discrimination is supported by the requisite subsidiary facts."

---

* References to the Addendum to Petition for Writ of Certiorari will be cited as follows: Add., p. _____.

Add., p. A-4, 654 F.2d at 1134. Petitioner's application for rehearing and suggestion of rehearing *en banc* were summarily denied on October 16, 1981 (Add., B)

REASONS FOR DENYING THE WRIT

The decisions of the district court and the Fifth Circuit Court of Appeals raise no issues of national importance and are in accord with jurisprudence established in this area.

First, the Court of Appeals, in accordance with applicable decisions of this Court, allocated to petitioner the rebuttal burden of raising the contention that the form of respondent's protest activities placed them outside the protection of the opposition clause of Title VII and provided the petitioner with a legitimate reason for its failure to rehire respondent.

Second, the Courts of Appeal which have considered the issue have ruled that to establish a prima facie case, a plaintiff must prove that (s)he had a reasonable belief that the employer had engaged in unlawful employment practices. Conversely, no Court of Appeals has ever ruled as petitioner argues that a plaintiff must prove the actual existence of those unlawful employment practices.

Third, the issues raised by this case have been definitively addressed by this Court.

Fourth, the Court of Appeals correctly held the trial court's finding of retaliatory discrimination to be supported by requisite subsidiary facts.

SUMMARY OF THE ARGUMENT

Respondent argues that this Court has clearly addressed the questions of the order and burden of proof in a disparate treatment case and that the decisions of the two lower courts are in complete accordance with this Court's decisions on the issue.

Respondent next argues that in order to establish a prima facie case of violation of the opposition clause of Title VII, he had only to demonstrate that he had a reasonable belief that the employer had engaged in unlawful employment practices which he was opposing, not that the employer had actually committed unlawful employment practices. The ruling of the Fifth Circuit on this issue is in accordance with every other appellate court which has considered the issue.

Finally, Respondent argues that the Fifth Circuit Court of Appeals correctly held that the trial court's finding of discrimination was supported by the requisite subsidiary facts.

ARGUMENT

A. The Decision of the Two Lower Courts Is In Accord With Applicable Decisions Of This Court Concerning the Shifting Burdens in a Title VII Disparate Treatment Case.

This Court has clearly addressed the questions of the order and burden of proof in a disparate treatment case in ***Mc Donnell Douglas Corp. v. Green***, 411 U.S. 792 (1973) and again in ***Texas Department of Community Affairs v. Burdine***, 450 U.S. 248 (1981). Those cases emphasize that a plaintiff has the initial burden at trial of establishing a prima facie case of discrimination. ***McDonnell Douglas***, 411 U.S. at 802. The burden then shifts to the defendant to articulate a legitimate, non-discrimnatory reason for the failure to relieve the plaintiff. ***Id.***; ***Burdine*** 450 U.S. at 253. Third, should the defendant carry its burden, the plaintiff is entitled to an opportunity to show that the defendant's stated reason for its failure to rehire plaintiff was in fact pretextual. ***McDonnell Douglas***, 411 U.S. at 804; ***Burdine***, 450 U.S. at 253.

Burdine clarified ***McDonnell Douglas*** by holding that the ***burdens of persuasion*** as opposed to the ***burden of coming forward*** never shifts. The ultimate burden of persuading the finder of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff, according to ***Burdine***, but not the burden of coming forward with evidence to rebut the presumption of discrimination raised by the plaintiff's prima facie case. Once a plaintiff in a Title VII case has presented a prima facie case, the defendant has the burden of coming forward with evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason:

> The defendant need not persuade the court

> that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.
>
> -- *Texas Department of Community Affairs v. Burdine* 450 U.S. at 254–56 (1981). Citation and footnotes omitted.

The Fifth Circuit's holding in the instant litigation was (1) that plaintiff (respondent) successfully established a prima facie case, thereby raising an inference of discrimination under Title VII, (2) that the burden then shifted to the defendant (petitioner) to rebut the presumption of discrimination by producing evidence "of a legitimate, nondiscriminatory reason for its failure to relieve plaintiff" (respondent), (3) that the defendant-petitioner met its burden by maintaining that the *only* reason plaintiff (respon-

dent) was not rehired was because he failed to reapply for a position and (4) that there is substantial evidence in the record to support the district court's finding that the explanation for the failure to relieve the plaintiff was merely pretextual. (654 F.2d at 1141 and 1142, Add., pp. A-20 to A-21; A-23).

The Fifth Circuit, citing *Smalley v. City of Eatonville*, 640 F.2d 765 at 769 (CA-5, 1981), held in the instant case that the plaintiff, in order to prove a prima facie case, had to establish (1) statutorily protected expression, (2) an adverse employment action and (3) a causal link between the protected expression and the adverse action. 654 F.2d at 1136; Add., p. A-9. This holding is certainly in keeping with the recognition by this Court *McDonnell Douglas* and *Burdine* that the specification of the prima facie proof required would necessarily differ with the facts in each case. 411 U.S., at 802, n.13; 450 U.S. at 253, n. 6.

There is no contention by petitioner that there was no adverse employment action - - it is clear from the record that plaintiff was not rehired, which certainly is "an adverse employment action." The contentions made by the petitioner are that the respondent did not establish statutorily protected expression, nor the link between the protected expression and the adverse action. The Fifth Circuit explored in detail the evidence presented at trial and agreed with the district court that a prima facie case had been established.

The first element of the prima facie case - - statutorily protected expression - - requires, according to the Fifth Circuit,

> "conduct by the plaintiff that is in opposition to an unlawful employment practice of the defendant. Thus for the plaintiff to prove that he engaged in statutorily protected ex-

> pression, he must show that the boycott and picketing activity in which he participated was in opposition to conduct by McLemore's that was made unlawful by Title VII." 654 F.2d at 1136; Add., p. A-9

The decision of the Fifth Circuit at that point cites the record evidence presented by plaintiff on this point - - a full two pages of the opinion as printed in the Addendum, Add., pp. A-10 to A-11, - - and concludes as follows: "Thus, there is substantial evidence to support the district court finding that the purpose of the boycott and picketing was to oppose defendant's discrimination against blacks in certain employment practice under section 703(a) (1)" (footnotes omitted) 654 F.2d at 1137; Add, pp. A-11 to A-12.

Petitioner states, however, that respondent failed to prove a prime facie case in that "there is no proof in this case . . . that petitioner was *aware* that respondent by his picketing, etc., opposed allegedly unlawful employment practices." Petition for a Writ of Certiorari, p. 14. Petitioner admits that it "undoubtedly refused respondent rehire because of his picketing and boycott activity, of which it was admittedly aware" (Petition, p. 14-15): the omission in plaintiff's case at trial, according to petitioner, was that plaintiff did not prove that petitioner was aware that plaintiff's actions in picketing and boycott were directed at an unlawful employment practice. The evidence presented at trial and cited by the Court of Appeals speaks directly to that point:

> "When plaintiff's attorney was cross-examining Mr. J. W. McLemore, Jr., the following interchange took place:
>
> Q. It was alleged that you and the other merchants would not hire blacks within a supervising position and dollar handling

positions, is that right?

A. That is incorrect so far as the McLemores were concerned.

Q. That was alleged, right?

A. Right.

In addition, at his deposition, when J. W. McLemore, Jr., was asked what the reason for the boycott was, he stated:

A. They claimed that - - uh - - the merchants in Winnsboro were unfair to - uh - blacks.

Q. How were they unfair, did they say?

A. Said they were not - uh - employing them in - uh - supervisory and - uh - sales capacity and - uh- where they handled funds, money." 654 F.2d at 1136–37; Add., p. A-10 to A-11.

Not only was the petitioner aware that the purpose of the boycott and picketing activity was in opposition to illegal actions by the petitioner, the District Court also found there to be substantial evidence to support the inference that the petitioner's failure to rehire respondent was causally related to respondent's boycott and picketing activities. See, *e. g.*, 654 F.2d 1141, footnote 13; Add., p. A-20, footnote 13.

Petitioner at trial steadfastly maintained that the *only* reason respondent was not rehired was because he failed to reapply for a position with petitioner: "This comprised the

full and complete extent of the rebuttal evidence presented by the agents of the defendant in an effort to articulate a legitimate, non-discriminatory reason for the failure to rehire the plaintiff." 654 F.2d at 1141, Add., p. A-21. On appeal, petitioner raised another supposed reason for its failure to rehire respondent: that the form of respondent's activity (picketing and boycotting) was not covered by Title VII. Petitioner's argument in its Petition for Certiorari is that respondent had the burden of presenting evidence as part of his prima facie case that the form of his opposition activity was covered by Title VII. Even if we assume that there is a question as to whether peaceful picketing and boycotts are protected by the opposition clause of Title VII, * it is clear from *McDonnell Douglas* and *Burdine* that the burden of coming forward on the issue was on the petitioner. *McDonnell Douglas* involved a factual situation similar in some respects to that present in the instant litigation. Percy Green was laid off in the course of a general reduction in the defendant's work force and, during the layoff, Mr. Green participated in a protest against alleged racial discrimination by the defendant in its employment practices. The protest included a "stall-in" whereby the plaintiff and others stopped their cars along roads leading to the employer's plant, so as to block access during rush hour. The defendant subsequently advertised for mechanics and rejected plaintiff's application on the basis of his participation in the "stall-in." In discussing the order and allocation of the burden of proof in such cases, this Court found a prima facie case had been established and that the burden

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* This Court in dicta has implicitly held "legitimate civil rights activities or protests" to be within the scope of the opposition clause. *McDonnell Douglas*, *supra*, 411 U.S. at 799. The text of the Act makes it illegal to discriminate against a person because he or she "has opposed any practice made on unlawful employment practice by this title." 42 U.S. 2000e—2(a) (1).

shifted to the employer to articulate a legitimate, non-discriminatory reason for the employee's rejection:

> "Here petitioner has assigned respondent's participation in unlawful conduct against it as the cause for his rejection. We think that this suffices to discharge petitioner's burden of proof at this stage and to meet respondent's prima facie case of discrimination." 411 U.S. at 803.

The negative pregnant of that language - - that a failure to articulate a legitimate, non-discriminatory reason for the employee's rejection would fail to discharge petitioner's burden of proof at this stage - - was confirmed in *Burdine.* Especially pertinent, and dispositive of the petitioner's argument in the instant case, is footnote nine:

> "An articulation [of a non-discriminatory reason] not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel." - - 450 U.S. at 255.

In discussing its justification for limiting an employer's evidentiary obligation to a burden of production, this Court made clear that its decision in *Burdine* should not hinder the employee:

> First, as noted above, the defendant's explanation of its legitimate reasons must be clear and reasonably specific. This obligation arises both from the necessity of rebutting the inference of discrimination arising from the prima facie case and from the requirement that the plaintiff be afforded 'a full and fair opportunity' to demonstrate pretext. Second, although the defendant does not bear a formal burden of persuasion, the defendant

> nevertheless retains an incentive to persuade the trier of fact that the employment decision was lawful. Thus, the defendant normally will attempt to prove the factual basis for its explanation. Third, the liberal discovery rules applicable to any civil suit in federal court are supplemented in a Title VII suit by the plaintiff's access to the Equal Employment Opportunity Commission's investigatory files concerning her complaint. Given these factors, we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proferred explanation lacking a factual basis is a pretext. We remain confident that the *McDonnell Douglas* framework permits the plaintiff meriting relief to demonstrate intentional discrimination.
> -- 450 U.S. at 258.

Petitioner would have this Court retreat from *Burdine* by placing additional burdens on the plaintiff in such litigation. The record in this case shows that petitioner maintained throughout the proceedings that the *only* reason it failed to rehire respondent was that he failed to reapply. By framing its response to respondent's prima facie case in such narrow terms, petitioner narrowed the factual inquiry to this issue alone. As the Fifth Circuit pointed out,

> "It became plaintiff's responsibility to show that this reason - - the only reason offered by the defendant for the failure to rehire the plaintiff - - was pretextual. Plaintiff was not required - - indeed, would not have been permitted - - to respond to an issue that defendant had never raised, either in its pleadings or in evidence introduced at trial. Where it is incumbent upon the defendant to narrow the issues, the defendant should not be entitled to raise new issues on appeal simply because those he relied upon at trial were

unsuccessful."

654 F.2d at 1146; Add.. [illegible]-33

In summary, the decision of the Fifth Circuit Court of Appeals in this case, as well as that of the district court, are in complete accord with the opinions of this Court concerning the shifting burdens in a Title VII disparate treatment case. The leading cases of this Court in this area, ***McDonnell Douglas*** and ***Burdine***, are not only cited by the opinion below, they are extensively quoted. Petitioner, by relying on respondent's alleged failure to reapply as its sole articulated reason for not rehiring him, met its rebuttal burden as to that issue. By failing to articulate in pretrial preceedings and to introduce a single piece of evidence that its ***real*** reason for failing to rehire Mr. Payne was the form of his opposition activity, after the reason professed at trial was determined to be pretextual, petitioner did not meet its burden under ***Burdine*** of articulating the reason by admissable evidence.

B. The Decision of the Fifth Circuit is in Accordance With Every Other Circuit Which Has Decided the Issue That In Order to Establish a Prima Facie Case, A Plaintiff Must Prove That (S) he had a Reasonable Belief That The Employer had Engaged In Unlawful Employment Practices.

Section 704(a) identifies two discret unlawful employment practices. It not only makes it unlawful to discriminate against an employee because the employee "has opposed any practice made an unlawful employment practice by this title" (the "opposition clause"), it also forbids discrimination against an employee because the employee "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this title" (The "participation clause"). It has consistently been respondent's position that his civil rights activity was protected by the opposition clause: no claim is made under the participation clause.

It is petitioner's position that the opposition clause requires actual proof that the employment practice opposed by an employee is in fact itself violative of Title VII. It was not enough, according to petitioner, that respondent had a reasonable belief that McLemore's failed to hire blacks in supervisory and money handling positions -- respondent was also required to prove that McLemore's in fact refused to hire blacks into such positions. Petitioner maintains that the Fifth Circuit's opinion below is in direct conflict with those of other circuits. It is respondent's position that, although there is no direct opinion of this Court on that issue, the Circuits which have considered the issue are in agreement with the Fifth Circuit's opinion below.

. The ruling below is candid in stating that the Fifth Circuit has not heretofore directly addressed the issue whether proof of an actual unlawful employment practice is necessary under the opposition clause, or whether an employee is protected from retaliation under the opposition clause if the employee reasonably believes that the employer is engaged in unlawful employment practices. The Fifth Circuit ruled that the latter conclusion is necessary in light of precedents of other circuits in order "to effectuate the policies of Title VII and to avoid the chilling effect that would otherwise arise". 654 F.2d at 1140, Add., p. A-19.

The Ninth Circuit was apparently the first appellate court to decide the issue. ***Sias v. City Demonstration Agency***, 588 F.2d 692 (CA-9, 1978), in which the City of Los Angeles maintained that since the trial court had made no finding of actual discrimination, it could not be held to have violated the opposition clause. The ***Sias*** court ruled that such a narrow interpretation would not only chill the legitimate assertion of employee rights but would tend to force employees to file formal charges rather than seek conciliation or informal adjustment of grievances. *Id.* at 695. The opinion quoted extensively from ***Hearth v. Metropolitan Transit Commission***, 436 F. Supp. 685 (D. Minn. 1977), which held that "as long as the employee had a reasonable belief

that what was being opposed constituted discrimination under Title VII, the claim of retaliation does not hinge upon a showing that the employer was in fact in violation of Title VII." *Id.* at 688.

The Seventh Circuit has also adopted this position. *Berg v. LaCrosse Cooler Co.*, 612 F.2d 1041 (CA-7, 1980). In *Berg*, the plaintiff was discharged when she challenged her employer's failure to provide pregnancy benefits as sex-based discrimination. After she was fired, the United States Supreme Court ruled that a disability benefits plan does not violate Title VII because of its failure to cover pregnancy related disabilities. *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). The Seventh Circuit held that where the employee opposed a practice under Title VII, her opposition was protected from retaliatory discharge even where the practice was later determined not to be an unlawful employment practice.

Petitioner in the instant case asserts that the "reasonable belief" standard adopted by the Fifth Circuit in the instant litigation, by the Ninth Circuit in *Sias*, and by the Seventh Circuit in *Berg* is in conflict with decisions of other appellate courts on the issue. The decisions that one supposedly in conflict with the "reasonable belief" standard are *Silver v. KCA, Inc.*, 586 F.2d 138 (CA-9, 1978), *Hochstadt v. Worcester Foundation*, 545 F.2d 222 (CA-1, 1976) and *Monteiro v. Poole Silver Company*, 615 F.2d 4 (CA-1, 1980). Petition, p. 12.

Silver v. KCA, Inc., involved the firing of a white worker who protested use of a racial epithet by a co-worker. The question framed by the Court of Appeals was whether the discharge was an unlawful employment practice if the basis for the discharge is the employee's opposition to a racially discriminatory act of a co-worker rather than to any unlawful employment practice by the employer. The Court held that not every act by an employee in opposition to racial discrimination is protected - - the opposition must be directed at an unlawful employment practice of an employer,

not an act of discrimination by a private individual. There was no allegation nor proof that the racial epithet was attributable to the employer - - the incident to which the plaintiff had reacted was no conduct of the employer nor conduct for which it was responsible. There was no discussion of the "reasonable belief" test in the opinion, nor was there a formulation of a standard in conflict with that test. The case turned on factual grounds different from those in the instant litigation, in *Sias*, or in *Berg* and is totally inapposite.

Hochstadt v. Worcester Foundation involved claims by a research scientist that her discharge was based on her activity in opposition to practices made illegal under Title VII. The First Circuit held that the evidence below supported a finding that the discharge was for independent, legitimate and non-discriminatory reasons and never reached the question of what test should be used to determine if there was a §704(a) violation. There was no discussion of the "reasonable belief" standard, nor, for that matter, was there a discussion of any other standard. The First Circuit did not hold in *Hochstadt* that proof of opposition to an actual employment practice was required, petitioner's brief in the instant litigation notwithstanding. The issue simply was not present in this case.

Monteiro v. Poole Silver Co. remains the only case out of the First Circuit which discusses the standard in such cases. The Fifth Circuit in the instant litigation discusses *Monteiro*, 654 F.2d at 1140, n. 11; Add., pp. A-19 to 20, n. 11. The First Circuit in *Monteiro* did not explicitly decide whether a section 704(a) plaintiff must "demonstrate that he harbored a 'reasonable belief' of discriminatory employer behavior" or whether the plaintiff must show that he harbored a " 'conscientiously held belief' of such misconduct." The Court found that under either standard - - the employer's conduct being nondiscriminatory in fact - - the plaintiff must show that his so-called opposition was in response to some honestly held, if mistaken, feeling that discriminatory practices existed." 615 F.2d at 8. According to the First Circuit, if a reasonable person might have believed that the employer

was engaged in unlawful employment practices, but the plaintiff actually did not in good faith hold such a belief, then the plaintiff's opposition is unprotected. *Id.* at 8, n. 6.

The Fifth Circuit in discussing *Montiero* found that it need not decide whether it is necessary to adopt a good faith requirement in addition to the reasonable belief requirement since the plaintiff in the instant litigation believed "reasonably and in good faith" that petitioner was engaged in unlawful employment practices. 654 F.2d at 1140, n. 11; Add., pp. A-19 to 20, n. 11.

Thus it seems abundantly clear that there is no split in the Circuits on the issue of the standard of proof in opposition cases. Only the First, Fifth, Seventh and Ninth Circuits have addressed the issue. Of those Circuits, the Fifth, Seventh and Ninth have explicitly adopted the "reasonable belief" standard. The First Circuit, in dicta, appears to have adopted a "reasonable belief in good faith" standard, but that standard is not in conflict with the other Circuits. Not only is there not a conflict, ***no appellate court has adopted the standard urged by petitioner herein*** that proof of actual discrimination must be proven. Such a standard is clearly contrary to the purposes of Title VII and would create a chilling effect by fear of retaliatory action in the event an alleged wrongdoing does not in fact exist. See the Fifth Circuit's scholarly and well-reasoned discussion below, 654 F.2d at 1137 to 1141, Add., pp. A-12 to A-20.

C. The Court of Appeals Correctly Held The Trial Court's Finding of Retaliatory Discrimination to Be Supported by Requisite Subsidiary Facts.

Respondent presented sufficient evidence to carry his burden of proving a prima facie case and also his burden of proving the reason articulated by the petitioner was pretextual. The Fifth Circuit reviewed in detail the evidence presented as to each point and held that the trial court's findings on each point were supported by the requisite subsidiary facts.

The opinion of the Fifth Circuit on the evidence presented on the prima facie case is contained in the Addendum, Add., pp. A-10 to A-11. Testimony was offered at trial indicating that McLemore's discriminated against blacks in employment opportunities and that the boycott and picketing organized by respondent against the petitioner's retail operations were in opposition to the failure of McLemore's to hire blacks in clerking, money-handling and supervisory jobs. Add., p. A-10. Evidence was also presented that the officers of petitioner knew that this was the purpose of the boycott and picketing. Add., pp. A-10 to A-11. Thus there is substantial evidence to support the district court and court of appeals finding that the purpose of the boycott and picketing was to oppose petitioner's discrimination against blacks in certain employment opportunities. Petitioner argues that there is no record evidence that respondent reasonably believed that McLemore's discriminated against blacks, but the Fifth Circuit cites record testimony of Russell Brass and Charles Payne that blacks couldn't get hired in the stores in Winnsboro, Louisiana, including those owned and operated by petitioner. See, *e. g.*, Add., pp. A-9, A-10 and A-11. The finding of the district court on this point was not only implicit in its decision, it was based on explicit record evidence.

Petitioner argues that respondent was required to present evidence such as "supportive statistical applicant flow data", "adverse statistical evidence of promotion decisions", "racial

slurs", "specific refusals to hire or refusals to promote", or "personal racial discrimination against respondent or his witness, Mr. Brass." No cases are cited to support petitioner's assertions that such evidence must be presented to show respondent's "reasonable belief" that petitioner had discriminated and, in fact, petitioner's arguments are simply a restatement of its position that respondent was required to *prove* that his employer had *in fact* discriminated. This position was thoroughly discussed in Section B, *supra*, and has never been supported by any appellate court.

This Court in *Burdine* specifically stated that establishing a prima facie case should not be onerous. The purpose of requiring a plaintiff to establish a prima facie case is to eliminate the most common nondiscriminatory reasons for the plaintiff's rejection. The defendant can defeat a prima facie case by simply raising a genuine issue of fact as to whether it unlawfully discriminated against the plaintiff. The defendant needs only to set forth the reasons for rejection, in which case the factual issue is framed with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. *Burdine, supra*, 450 U.S. at 256.

There is no hint of evidence at trial that respondent did not have a reasonable belief that petitioner discriminated against blacks, nor did petitioner articulate respondent's supposed lack of reasonable belief as a reason for the failure to rehire respondent. The district court and the Fifth Circuit have held that the record shows Mr. Payne had a reasonable belief that his employer discriminated against blacks in violation of Title VII, that he organized a boycott and picketing activities against his employer and that he later reapplied for his old job and was rejected, although others were hired. Both the district court and the Fifth Circuit found that petitioner articulated only one reason for respondent's rejection - - that he never reapplied for his job - - and that reason was only pretextual. Both courts found that respondent carried both his burden of production and burden of persuasion in this case, and the record amply supports the findings of both courts.

CONCLUSION

The petition for certiorari filed in this matter is simply a continuation of the lengthy legal battle waged by McLemore's Wholesale and Retail Stores since 1970. The arguments presented in the petition are neither novel nor compelling, but essentially are arguments based on whether the evidence presented on certain issues was sufficient or not. This Court should not grant certiorari in this matter to review the sufficiency of the evidence. The Fifth Circuit's opinion is not in conflict with either the holdings of other circuits or the holdings of this Court. The opinion on which certiorari is sought is well reasoned, well-researched and is amply supported by the facts at trial and legal precedent. The petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is certified that copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were served on petitioner by mailing same to its counsel of record as required by Rule 28(3) of this Court.

New Orleans, Louisiana, this 17th day of February, 1982.

R. James Kellogg

R. JAMES KELLOGG